

CROSS-EXAMINATION - ROBERT J. DOLAN

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1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
3 - - - - -
4 The State of Minnesota,
5 by Hubert H. Humphrey, III,
6 its attorney general,
7 and
8 Blue Cross and Blue Shield
9 of Minnesota,
10 Plaintiffs,
11 vs. File No. C1-94-8565
12 Philip Morris Incorporated, R.J.
13 Reynolds Tobacco Company, Brown
14 & Williamson Tobacco Corporation,
15 B.A.T. Industries P.L.C., Lorillard
16 Tobacco Company, The American
17 Tobacco Company, Liggett Group, Inc.,
18 The Council for Tobacco Research-U.S.A.,
19 Inc., and The Tobacco Institute, Inc.,
20 Defendants.
21 - - - - -
22 TRANSCRIPT OF PROCEEDINGS
23 VOLUME 42, PAGES 8021 - 8270
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25

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1 P R O C E E D I N G S.
2 THE CLERK: All rise. Ramsey County
3 District Court is again in session, the Honorable
4 Kenneth J. Fitzpatrick now presiding.
5 (Jury enters the courtroom.)
6 THE CLERK: Please be seated.
7 THE COURT: Good morning.
8 (Collective "Good morning.")
9 THE COURT: Counsel.
10 MR. BLEAKLEY: Thank you, Your Honor.
11 ROBERT J. DOLAN
12 called as a witness, being previously
13 sworn, was examined and testified as
14 follows:
15 CROSS-EXAMINATION (cont'd)
16 BY MR. BLEAKLEY:
17 Q. Good morning, Professor Dolan.
18 A. Good morning.
19 MR. BLEAKLEY: Good morning, ladies and
20 gentlemen.
21 (Collective "Good morning.")
22 Q. Yesterday when we broke, for what I hope was an
23 enjoyable balance of St. Patrick's Day for everyone,
24 we were talking about some of the published
25 literature dealing with the issue of the effect of
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1 cigarette advertising on -- on consumption. Do you
2 recall that?
3 A. Yes, I do.

4 Q. And I was asking you about the 1987 economic
5 report of the president. Is that correct?

6 A. Yes, I recall that. Uh-huh.

7 MR. BLEAKLEY: Your Honor, I now have a
8 complete copy of the 1987 Economic Report of the
9 President, which I have -- copy of which I have
10 placed up there by Professor Dolan, I've given to
11 counsel for the plaintiffs, and I believe Your Honor
12 has a copy too.

13 THE COURT: Are you moving its
14 introduction?

15 MR. BLEAKLEY: Yes, Your Honor, we move the
16 admission of Exhibit CW000158.

17 MR. CIRESI: As a government document?

18 MR. BLEAKLEY: Yes, Your Honor.

19 MR. CIRESI: No objection, Your Honor.

20 THE COURT: Court will receive CW000158.

21 BY MR. BLEAKLEY:

22 Q. Would you turn, Professor Dolan, to page 188 in
23 that exhibit. Excuse me, 186.

24 A. 186? Yeah.

25 Q. Actually let me first ask you: This document is
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1 entitled "Economic Report of the President" as
2 "Transmitted to the Congress" in January of 1987; is
3 that correct?

4 A. That's what I see on the front page, yes,
5 uh-huh.

6 Q. And chapter six of this exhibit is entitled
7 "Risk and Responsibility," do you see that?

8 A. Well, let's see --

9 I do now on page 111. Okay.

10 Q. And chapter six -- I'm sorry.

11 A. Table of contents? On the table of contents
12 page?

13 Q. Yes.

14 A. Yes, chapter six, "Risk and Responsibility,"
15 yes, uh-huh.

16 Q. And would you turn to page 179 first.

17 A. 179?

18 Q. Yes.

19 A. Okay. Okay.

20 Q. Page 179 is the beginning of chapter six --
21 A. Yes.

22 Q. -- which reads, "Risk and Responsibility." Do
23 you see that?

24 A. I do.

25 Q. "Risk is a fact of life. Every person balances
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1 risks of accident and injury against the attainment
2 of other goals." Do you see that?

3 A. I do see that.

4 Q. Okay. Now if you would turn to page 186, the
5 Economic Report of the President states, "The effects
6 of tobacco advertising are complex. There is little
7 evidence that advertising results in additional
8 smoking. As with many other products, advertising

9 mainly shifts consumers among brands." That's what
10 the Economic Report of the President says?
11 A. I believe you read that correctly, correct, yes.
12 Q. And when it says "advertising mainly shifts
13 consumers among brands," that's the brand switching
14 that we've been talking about; isn't it?
15 A. Right. Uh-huh.
16 Q. Now the Surgeon General of the United States in
17 his 1989 report also concluded that there is no
18 scientifically rigorous study available to the public
19 that provides a definitive answer to the basic
20 question of whether advertising and promotion
21 increased the level of tobacco consumption; isn't
22 that right?
23 A. I believe that is correct. If you stipulate
24 that that's true, I would not argue with you on that.
25 Again, it's taking advertising away from the rest of

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1 the total marketing and communications campaign,
2 and --
3 Q. You --
4 A. -- when the Economic Report of the President
5 marshalled the evidence of tobacco bans in Italy,
6 Finland, Iceland and Singapore as the primary
7 evidence for their statement, I'd much rather look at
8 what's going on in the United States and the total
9 marketing and communications program in making a
10 judgment about that.
11 Q. Well let's talk about the advertising bans for a
12 moment. You're also aware of the fact, are you not,
13 that there have been a number of studies of the
14 effect of advertising bans on cigarette consumption
15 in those countries that have enacted advertising
16 bans; aren't you?
17 MR. CIRESI: Objection, irrelevant.
18 THE COURT: Well you may answer if you
19 know.
20 A. Yes, I'm aware that there have been a number of
21 studies.
22 Q. And you know that these studies conclude that
23 there is no significant change in cigarette
24 consumption after advertising bans have been enacted;
25 don't you?

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1 MR. CIRESI: Same objection, Your Honor,
2 it's irrelevant.
3 THE COURT: Sustained.
4 Q. Now let's talk for a moment about some of the
5 ads that you discussed yesterday.
6 A. Are we done with the economic report?
7 Q. Yes.
8 A. Can I get rid of this?
9 Thank you.
10 Q. You would agree with me, would you not, that
11 there have been no what you described as explicit
12 health claims in cigarette ads since about 1954?
13 A. I -- I honestly don't know the specific point in

14 time beyond which I would say there would be no --
15 there have been no explicit health claims.
16 Q. Well let's say the mid-1950s then. You would
17 agree with me that there haven't been any since then?
18 A. I -- I'd really have to stick with my previous
19 answer. I -- I don't have any at the ready to offer
20 you as being post-mid-'50s that did have explicit
21 health claims, but that's as much as I can say about
22 that.
23 Q. Haven't been any for a long time in any event.
24 A. Well I suppose that gets us into a discussion of
25 what is a long time and so forth, so --

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1 But there haven't been any recently as far as
2 I -- as far as -- not to my knowledge anyway.
3 Q. Now Mr. Ciresi asked you yesterday if the
4 cigarette companies in any of their ads have warned
5 people about the risk of lung cancer. Do you
6 remember that question?
7 A. I do.
8 Q. You know that in fact there has been a health
9 warning on every pack of cigarettes sold in the
10 United States since 1966, though; don't you?
11 A. I do.
12 Q. Now what you described as the implicit health
13 claims have all related to filters and low tar and
14 nicotine, haven't they?
15 A. I -- I would not say that that's necessarily the
16 case. I mean I think the ones that we looked at
17 explicitly yesterday were around the issue of
18 filtration, the Lark ad and the True ad and Merit and
19 so forth, they were around the issue of filtration
20 and low -- and lower tar and lower nicotine.
21 Q. Well then let me ask the question directly: Are
22 you aware of any advertisements in which the
23 cigarette companies have made implicit health claims
24 that did not involve filters or low tar and nicotine?
25 A. I would say that some people would interpret an

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1 ad as being a health reassurance ad and not
2 explicitly note the tar and nicotine aspect of it.
3 Q. Which ones?
4 A. I guess I don't have a specific example to give
5 you as I sit here, but as I looked through the
6 general theme of -- of the advertising, I mean I --
7 it's not clear to me that every one of them that is
8 offering health reassurance -- it could be just
9 depicting of a healthy person. If we looked at
10 the -- as you remember the Merit ad that we looked at
11 yesterday with the -- with the woman saying, "Yes, I
12 can" on it, and then it goes on to discuss low -- low
13 tar and nicotine, I believe that's a health
14 reassurance-type advertising. I mean if you look at
15 the general theme which is set out in the advertising
16 and marketing strategy statement, the theme of health
17 reassurance is there. And -- and as we saw with --
18 with B.A.T. Company saying, look, this has got to

19 pervade everything that we do in our communications.
20 So there could be some ads, some communications
21 with the marketplace which don't explicitly have low
22 tar/low nicotine in big letters which in fact do fall
23 under this heading or promote the general theme of
24 health reassurance.

25 Q. Have you done any research to determine whether

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1 smokers looking at those ads see them as health
2 reassurances?

3 A. I have not. I have not looked explicitly at the
4 question of: When you see this ad, do you interpret
5 it as health reassurance? What I do know is that
6 when they asked people in the mid-'70s what is the
7 primary improvement you would like to see in your
8 cigarettes, they said low tar/low nicotine. That's
9 the primary improvement that they wanted to see.

10 Q. And in fact, filters and low tar and nicotine
11 cigarettes are the primary improvement that took
12 place in cigarettes during the '60s and '70s and
13 '80s; isn't it?

14 A. I wouldn't regard them as an improvement at all.
15 Mr. Schindler said that he has no data at RJR and
16 there's no data at all in the industry that shows
17 that low tar/low nicotine cigarettes are in any way
18 safer.

19 Q. All right. We'll say design then. The
20 principal changes in the design of cigarettes in the
21 '60s, '70s, '80s, and '90s has been in the area of
22 filters and low tar and nicotine; correct?

23 MR. CIRESI: Objection, Your Honor, it's
24 outside the scope. He's not here on the design of
25 cigarettes.

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1 THE COURT: Sustained.

2 MR. BLEAKLEY: I'm not asking him any
3 questions about the actual design, what I am
4 attempting to do, Your Honor, is establish that
5 filters and low tar and nicotine, which is the
6 subject of all of this advertising and is the subject
7 matter of Professor Dolan's testimony.

8 THE COURT: I don't think he's ever been
9 qualified as an expert on the design. I don't think
10 that's his area of expertise.

11 MR. BLEAKLEY: Well I'll try a different
12 question.

13 THE COURT: Okay.

14 BY MR. BLEAKLEY:

15 Q. You would agree with me, would you not,
16 Professor Dolan, that as more and more filters and
17 low tar and nicotine cigarettes came on the market,
18 the cigarette market in the United States became
19 intensely competitive; didn't it?

20 A. I would say that coincidence -- coincident with
21 the establishment of this new segment of the market,
22 this health reassurance and the proliferation of
23 brands, as we talked about a number of times about

24 the product line extensions; for example, Merit now
25 being available in -- well Merit coming onto the
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1 market first as a low tar brand and then being
2 available in three different types, that there were
3 many new brands introduced to the marketplace during
4 that time period.

5 Q. And virtually all of them, if not all of them,
6 were filtered or low tar and nicotine cigarettes;
7 weren't they?

8 A. Well I would -- I would be certainly --
9 I would be comfortable saying that it is my
10 belief that most of the new product introductions in
11 the mid -- you know, after 1970 had been in the low
12 tar and low -- low nicotine area.

13 Q. And the --

14 A. The health reassurance segment.

15 Q. And the claims that the cigarette companies
16 could make about these cigarettes were regulated by
17 the Federal Trade Commission; weren't they?

18 A. I understand that to be the case, yes.

19 Q. And the Federal Trade Commission wouldn't allow
20 the cigarette companies to make any claims that they
21 didn't think were supported by scientific evidence.

22 MR. CIRESI: Objection, Your Honor, that
23 calls for a legal conclusion. Also the form of the
24 question, counsel is testifying.

25 THE COURT: Sustained.

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1 Q. Incidentally, the health reassurance ads, as you
2 described them, that you showed to the ladies and
3 gentlemen of the jury yesterday, were for Barclay,
4 True and Kool; were they not?

5 A. No, that's incorrect.

6 Q. They weren't for Barclay?

7 A. No.

8 Q. And they weren't for True?

9 A. They were for True.

10 Q. And they weren't for Kool.

11 A. No, they were not.

12 Q. Has True been a big success in the market?

13 A. Well in 1970 I believe it hailed itself as the
14 largest selling brand in the market -- in the -- in
15 the low tar/low nicotine segment of the market. I
16 believe it is still sold today.

17 Q. Has it been a big success?

18 A. Well that would get us into a long discussion of
19 how you want to define "success."

20 Q. Which you're not prepared to do; is that right?

21 A. Well you can ask -- I could --

22 I guess you could ask me if I regard it as
23 successful, but --

24 Q. Well what are the biggest selling brands in the
25 marketplace? What have been the biggest selling

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1 brands in the marketplace over recent years?
 2 A. Over the recent years?
 3 Q. Yeah.
 4 A. Well I would say the -- you know, certainly
 5 the -- obviously the --
 6 The largest selling ones would be Marlboro, and
 7 sticking within the -- sticking within the Philip
 8 Morris family for the moment, I mean it would be
 9 Marlboro and its different versions, Benson & Hedges,
 10 Virginia Slims, Merit I guess would be the Philip
 11 Morris ones. RJR, we'd have Winston, Camels, Salems.
 12 Brown & Williamson, we'd have -- I believe that's
 13 Kool. Right? Lorillard we'd have Newport. So
 14 those -- those would be some of the major ones.
 15 Q. Would you agree with me that the filtered and
 16 low tar and nicotine cigarettes were introduced in
 17 response to consumer demand?
 18 A. No, I don't -- I don't know that that's the
 19 case.
 20 Q. You don't think that's what consumers wanted?
 21 A. I think consumers would like a low tar --
 22 would -- would like a cigarette which reduced their
 23 health risk, but they don't want a cigarette which is
 24 bogusly proclaimed to do so but in fact does not.
 25 Q. So my question is: Do you think that low tar

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1 and nicotine and filter cigarettes were introduced in
 2 response to consumer demand?
 3 A. I don't believe consumers had demand for a low
 4 tar/low nicotine cigarette which in fact provided
 5 them no benefit. Consumers have a desire, a demand
 6 for a product which is safer, does in fact give them
 7 benefits. The situation here is that consumers
 8 wanted health reassurance and this health reassurance
 9 segment was established because consumers wanted the
 10 health reassurance, and in fact they were provided
 11 products which were no safer than the products which
 12 were already on the market. So --
 13 Q. Your testimony is that they were no safer.
 14 A. I -- I know what Mr. Schindler said about this,
 15 that he has no data at -- at RJR and that he knows of
 16 no other industry data that would show that low
 17 tar/low nicotine cigarettes are safer than the other
 18 cigarettes.
 19 Q. Is it your testimony that low tar and nicotine
 20 cigarettes are not safer?
 21 MR. CIRESI: Objection, asked and answered.
 22 THE COURT: I think he answered it.
 23 Q. Do you have an expert opinion as to whether low
 24 tar and nicotine cigarettes are safer?
 25 MR. CIRESI: Objection, Your Honor. He

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1 wasn't offered as a medical doctor. He reviewed the
 2 defendants' documents.
 3 MR. BLEAKLEY: But he offered the opinion,
 4 Your Honor, just a moment ago on his own.

5 MR. CIRESI: Your Honor, I object to the
6 form of the question. Counsel's argument is
7 improper.

8 THE COURT: Sustained.

9 BY MR. BLEAKLEY:

10 Q. All right. Would you agree with me, Professor
11 Dolan, that filtered and low tar and nicotine
12 cigarettes were introduced -- were actually being
13 called for by doctors and public health authorities?

14 MR. CIRESI: Objection to the form of the
15 question. Counsel is testifying.

16 THE COURT: Okay. You can answer that.

17 A. My understanding is that there was a --

18 You know, certainly doctors and health
19 authorities wanted to see a safer product in the
20 marketplace, and there may well have been some
21 doctors who perceived that having a lower tar/low
22 nicotine cigarette in fact was a way to achieve that,
23 not understanding the issues of compensation,
24 which -- the changes in smoking behavior which the
25 people inside the industry did -- did understand.

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1 Q. Are you testifying about compensation?

2 A. I'm sorry?

3 Q. Are you testifying here about compensation?

4 A. Am I test -- I'm --

5 I don't understand your question.

6 Q. Do you have any expert knowledge on the issue of
7 compensation?

8 MR. CIRESI: Your Honor, he wasn't offered
9 as an expert on compensation. Counsel asked a
10 question. He told him his opinion based on the
11 documents he's reviewed.

12 MR. BLEAKLEY: Your Honor, if the witness
13 volunteers information like that, I should be allowed
14 to cross-examine.

15 THE COURT: On what?

16 MR. BLEAKLEY: On the issue of
17 compensation. He has made a statement about
18 compensation, and I want to find out if he knows what
19 he's talking about.

20 THE COURT: All right. I believe you asked
21 him the question, he answered your question.

22 He can answer whether he is an expert on
23 compensation.

24 A. Oh, I do not consider myself an expert on the
25 issue of compensation.

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1 Q. Okay. Now, isn't it a fact that doctors and
2 public health authorities made specific calls for the
3 production and sale in the United States of filtered
4 and low tar and nicotine cigarettes?

5 MR. CIRESI: Objection, it calls for facts
6 that this witness is not aware of. Counsel is
7 testifying. He's not relating it to anybody. It's
8 outside the scope of direct.

9 THE COURT: You can answer that if you

10 know.
11 A. I really wouldn't know.
12 Q. Would you turn to Exhibit 10 --
13 Let me ask you first: --
14 A. Okay.
15 Q. -- don't the documents that you reviewed in this
16 case in fact reveal that doctors and public health
17 authorities were calling for filtered and low tar and
18 nicotine cigarettes?
19 A. I do -- I do understand that -- let's see, it
20 would be what, late '60s or so, I think, the Surgeon
21 General was saying that, you know, there seems to --
22 you know, the evidence suggests that low tar and low
23 nicotine would be a -- I think had some health
24 benefit associated with it. Subsequently, in later
25 Surgeon General's reports, when we get to the Surgeon

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1 General report of 1981, that -- that report concludes
2 there is no such thing as a safe cigarette, there is
3 no safe level of compensation -- there is no safe
4 level of consumption, and in fact says the move to
5 low tar/low nicotine, there are some caveats that you
6 have to adopt with respect to it. Number one is the
7 issue of the changing of the smoking behavior.
8 Number two is the issue of whether in fact, when that
9 smoking behavior is changed, whether the smoke goes
10 deeper into the lungs and now causes a different kind
11 of cancer, and also the issue of additives. I mean
12 it says, you know, there is no -- there's no
13 substitute, really, for quitting.

14 So I think the Surgeon General adopted a much
15 more cautious tone over time about what the benefits
16 of low tar and low nicotine might be.

17 Q. So the answer to my question is that, yes,
18 public health authorities did call for the production
19 and sale of filtered and low tar and nicotine
20 cigarettes; right?

21 MR. CIRESI: Objection to the form of the
22 question, a characterization of the testimony.

23 THE COURT: I think it's been answered.

24 Q. Would you turn to Exhibit 10602.

25 A. Out of mine or yours?

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1 Q. That's a plaintiffs' exhibit. I'm sorry.
2 A. Okay.
3 Q. Yes, one of the exhibits that you referred to
4 yesterday, a BATCo Ltd. document.
5 Do you have that document in front of you?
6 A. I do.
7 Q. Would you turn to the page that's Bates numbered
8 583.
9 A. Uh-huh.
10 Q. Yesterday you referred the jury's attention to
11 paragraph 14 and 15 --
12 A. Uh-huh.
13 Q. -- about explicit health claims and implied
14 health claims; right?

15 A. I -- I did refer to those points, uh-huh.
16 Q. Paragraph 16, which you did not bring to the
17 attention of the jury yesterday, says, "Reduction in
18 biological activity per cigarette (rather than
19 specific activity) will continue to be accepted by
20 doctors as desirable." Right?

21 A. I believe you read that correctly, yes.

22 Q. So according to one of the documents upon which
23 you relied, the reduction in biological activity per
24 cigarette will continue to be accepted by doctors as
25 desirable; right?

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1 A. You read it correctly again.

2 Q. Are you aware of the fact that Dr. Ernst Wynder
3 recommended to Congress that --

4 MR. CIRESI: Your Honor -- excuse me,
5 counsel, I hate to interrupt you, but it's an
6 entirely improper form of question. Counsel is
7 testifying.

8 MR. BLEAKLEY: Your Honor, I object to --

9 THE COURT: Do you have --

10 MR. BLEAKLEY: -- the repeated
11 interruptions of my questions, especially when
12 counsel then tells me the form of my question is
13 objectionable when I haven't even been permitted to
14 finish it.

15 THE COURT: Do you have a document that
16 you're going to be introducing?

17 MR. BLEAKLEY: Yes, I do.

18 THE COURT: Okay.

19 BY MR. BLEAKLEY:

20 Q. Actually, let me go to -- let me go to the
21 Surgeon General's report that you just discussed, the
22 1981 Surgeon General's report. Do you remember the
23 1981 Surgeon General's report in your testimony just
24 a moment ago?

25 A. I --

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1 Q. Remember what the subject matter of the 1981
2 Surgeon General's report was?

3 A. Let's see, I believe it was health -- healthier
4 cigarettes or something along -- I -- I honestly
5 don't remember exactly what the title was.

6 Q. Would you take a look at tab 45 in -- in the
7 second of the three binders that we gave you.

8 A. Sorry. Here I am. Okay.

9 Q. Now did I understand you to be saying that the
10 1981 Surgeon General's report no longer recommended
11 low tar and nicotine cigarettes?

12 A. It -- as I said, it affirmed, I -- I believe,
13 the -- the earlier Surgeon General's reports, saying
14 that basically the idea of low -- moving to low tar
15 and no -- low nicotine cigarettes seems to be equated
16 with a potential improvement in health, particularly
17 with respect to lung cancer. However, it then does
18 go on to add the caveat that we talked about a moment
19 ago and it said while it reaffirms the earlier

20 report, it adopts a more cautious tone and says, you
21 know, there's -- there's nothing like quitting.

22 There's the issue of compensation, there may be
23 new diseases as people adjust their behavior in
24 smoking and take the smoke deeper into their lungs,
25 and we're not so sure about the new additives that

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1 have gone in. So it reaffirms what the earlier
2 reports had said, but then adds these important
3 caveats.

4 Q. Would you turn to page 200, please. Do you see
5 the paragraph that begins with "The U.S. Public
6 Health Service...?"

7 A. Yes, I see that.

8 Q. And what that says down toward the bottom of the
9 sentence that begins "In 1966...," "In 1966, the
10 PHS" --

11 That's Public Health Service, right?

12 A. I would --

13 Yeah, right.

14 Q. -- "the Public Health Service submitted to
15 Congress (42) the Technical Report on 'Tar' and
16 Nicotine. On the basis of the clear demonstrated --
17 clear demonstration of cigarette dose-dependent risks
18 of several diseases, the PHS concluded:

19 "The preponderance of scientific evidence
20 strongly suggests that the lower the 'tar' and
21 nicotine content of cigarette smoke, the less harmful
22 would be the effect.

23 "We recommend...the progressive reduction of the
24 'tar' and nicotine content of cigarette smoke."

25 Right?

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1 A. Well there's a few dot dot dots in after the
2 "recommend," saying that something has been taken out
3 between -- in that last sentence, but other than
4 that, right.

5 Q. Now would you turn to page 18 of the 1981
6 Surgeon General's report. Now in this, the Surgeon
7 General is not referring back to 1966, but making a
8 statement as of 1981; isn't he?

9 A. I'd have to go back and sort of check that,
10 unless you just want me to accept that.

11 Q. Why don't you accept it for the moment.

12 A. Okay. Fine.

13 Q. What the Surgeon General says is, "Today's
14 filter-tipped, lower tar and nicotine cigarettes
15 produce lower rates of lung cancer than do their
16 higher tar and nicotine predecessors." See that?

17 A. I do see that.

18 Q. And then down in paragraph four he says, "The
19 occurrence of laryngeal cancer has been reported to
20 be reduced among smokers who use filtered cigarettes,
21 compared with those who use non-filtered cigarettes."

22 A. Uh-huh. Okay.

23 Q. Now have you reviewed the testimony given by
24 Professor -- Dr. Samet here in this trial?

25 A. Have I reviewed it? No, I have not.
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1 Q. Are you aware of the fact that Dr. Samet said
2 that there has been a reduction in lung cancer after
3 the introduction of low tar and nicotine cigarettes?
4 MR. CIRESI: I'm going to object -- object
5 to the characterization of Dr. Samet's testimony.
6 THE COURT: Sustained.

7 MR. BLEAKLEY: Well Your Honor, I think
8 it's an accurate characterization of what Dr. Samet
9 said.

10 THE COURT: Counsel, counsel, the objection
11 was sustained. Do you have another question?

12 MR. BLEAKLEY: May I refer the witness to
13 Dr. Samet's testimony?

14 THE COURT: If he hasn't reviewed it, no.
15 BY MR. BLEAKLEY:

16 Q. You haven't reviewed it?

17 A. Oh, no, I have not.

18 Q. And no one has told you what Dr. Samet testified
19 about this, on this subject?

20 A. No, I don't believe so.

21 Q. And you didn't ask what the evidence was about
22 the low tar and nicotine and what effect it has on --

23 MR. CIRESI: Objection, Your Honor, it's
24 irrelevant.

25 THE COURT: You can answer.

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1 A. I didn't ask about the evidence?

2 Q. Yeah.

3 A. I did -- I did, as we --

4 As I got into the analysis of the low -- low
5 tar/low nicotine cigarettes, I did pursue the issue
6 of what were the true health impacts of -- of that,
7 yes.

8 Q. You looked into it, but you didn't read what Dr.
9 Samet said here in this trial.

10 A. Well you could put together the two answers that
11 I've just given and say that, right. I did not
12 review what Dr. Samet said, but I examined the issue.

13 Q. Now let's talk for just a moment about brand
14 loyalty and brand switching, which was the fourth of
15 your list of four objectives of what you describe as
16 the defendants' total marketing and communications
17 program. Right?

18 A. Right.

19 Q. Isn't it a fact that the principal objective of
20 the defendants' advertising and marketing programs
21 over the past years has been brand loyalty and brand
22 switching?

23 A. No, I -- as I said yesterday, you know, I -- I
24 take those four objectives that we talked about and
25 kind of look at them as a whole, and I don't really

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1 try to separate out -- I think it's improper to try
2 to separate out which one of those four was more
3 important or less important or what the priority
4 order was. It's all part of the total marketing
5 system.
6 Q. Isn't it a fact that since industry demand is
7 essentially fixed, the only way to increase sales is
8 through share acquisition; i.e., at the cost of a
9 competitor?
10 A. No.
11 Q. Didn't you say that?
12 A. I quoted someone else saying that as they
13 referred to the cigarette industry in the years 1890
14 to 1946.
15 Q. Would you refer to tab 46, please.
16 MR. CIRESI: May we have an exhibit number,
17 please?
18 MR. BLEAKLEY: Sorry. Exhibit No.
19 SM000077.
20 Q. This is an article entitled "MODELS OF
21 COMPETITION: A REVIEW OF THEORY AND EMPIRICAL
22 EVIDENCE" written by Robert J. Dolan, Harvard
23 University.
24 MR. CIRESI: Excuse me, counsel, may I have
25 that again?

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1 MR. BLEAKLEY: Sorry. SM000077.
2 Do you have it, Mr. Ciresi? Did you find it?
3 MR. CIRESI: I have an empty folder, but
4 you go ahead and proceed.
5 MR. BLEAKLEY: That happened to me
6 yesterday. Very frustrating. I know the feeling.
7 MR. CIRESI: I'm not frustrated, counsel.
8 You just proceed.
9 BY MR. BLEAKLEY:
10 Q. Professor Dolan, do you have it?
11 A. Oh, yes. I have it.
12 Q. And that Robert Dolan is you; is it not?
13 A. It sure is. That's me.
14 Q. You wrote this article.
15 And would you turn to page 232, please. Are you
16 on page 232?
17 A. Yeah, I'm there.
18 THE COURT: Counsel, may I ask what tab
19 this is, tab number?
20 MR. BLEAKLEY: Sorry, I thought I said it.
21 Tab 46.
22 THE COURT: All right. I thought you said
23 tab 45.
24 MR. BLEAKLEY: I probably did. I
25 apologize.

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1 THE COURT: Go ahead, I've got it.
2 MR. BLEAKLEY: Tab 46.
3 BY MR. BLEAKLEY:
4 Q. Page 232.
5 A. Uh-huh.

6 Q. Entitled "Cigarette Motorcycle."
7 A. Uh-huh.
8 Q. You said, "Generic demands for cigarettes is
9 price inelastic while selective demand is price
10 elastic (Tennant 1961)," and then you went on to say,
11 "Since industry demand is essentially fixed, the only
12 way to increase sales is through share acquisition;
13 i.e., at the cost of a competitor." Right?
14 A. Well you read correctly what is --
15 We don't want to put this one up on the --
16 Q. I haven't offered it in evidence.
17 A. Oh, I see. Okay. Sorry. Forgot the rules.
18 That's -- that's what's written here. I mean
19 basically, again, as I said a moment ago, this was a
20 study which was done of the tobacco industry covering
21 the years from 1890 to 1946, and Professor Tennant in
22 this article and what I'm quoting here, generic
23 demands for cigarette is price inelastic, right,
24 that's what he's referring to there. That's what I'm
25 referring to there, not anything about advertising.

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1 So it's saying the size of the market does not change
2 with the price level. And, you know, but selective
3 demand -- and he's looking at cigarettes which
4 were -- some of which were -- he's looking at people
5 switching from brands which were 10 cents to brands
6 which were seven cents and saying that brand shares
7 are -- are elastic. But I think -- I think most of
8 us -- well I -- I would certainly kind of look at the
9 market of recent times and say, "Gee, is the size of
10 the market impacted by excise taxes? Is the size of
11 the market impacted by the way that prices of
12 cigarettes have gone up in the 1980s?" Certainly my
13 judgment is that there has been an effect of price on
14 the overall size of the market.

15 Q. But what you said in this article was, "Since
16 industry demand is essentially fixed...," is that not
17 what you said?

18 A. I'm -- I'm sort of carrying on with his analysis
19 of the industry from 19 -- 1890 to 1946.

20 Q. Isn't it a fact that industry demand is
21 essentially fixed and indeed declining?

22 A. I --

23 MR. CIRESI: Excuse me, professor. Your
24 Honor, what time period? This one is outside the
25 scope of this case. Is he now --

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1 THE COURT: Yeah. Can you give us a time
2 period, please?

3 Q. Hasn't industry demand been fixed or declining
4 for the last 30 years?

5 A. Well those are two different things. Fixed --
6 It has been declining. My -- the way I have it
7 in my head, it goes -- starts to go down, what, in
8 1982 or so, something around there.

9 Q. That's about right. Sorry.

10 A. Is that right? All right.

11 But the issue of whether it's fixed or not is an
12 entirely different issue from whether the number of
13 cigarettes sold has been going down or not. "Fixed"
14 means does the size of the market -- is it responsive
15 to the marketing and communications efforts of the
16 manufacturers? So fixed and whether you're going
17 down or not are totally different concepts.

18 Q. Would you turn to tab three.

19 MR. CIRESI: May we have an exhibit number,
20 counsel?

21 MR. BLEAKLEY: Exhibit MD000113, the 1979
22 report of the Surgeon General of the United States.

23 Q. Do you have that?

24 A. Oh, yeah, I have it.

25 Q. Would you turn to page 18-23, and refer you

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1 specifically to the paragraph that starts with the
2 word "Whiteside...."

3 A. Okay.

4 Q. Do you see in the middle of that page, "As the
5 cigarette industry has asserted, the major action of
6 cigarette advertising now seems to be to shift brand
7 preferences, to alter market shares for a particular
8 brand?"

9 A. Do I see that --

10 Q. Yes.

11 A. -- statement?

12 Q. Yes.

13 A. I do see that statement.

14 Q. And now would you turn back to the 1987 Economic
15 Report of the President, and to the statement that we
16 referred to before.

17 A. So are we done with Mr. Whiteside's speculative
18 analysis?

19 MR. BLEAKLEY: Move to strike the
20 commentary, Your Honor.

21 Q. Yes, we're finished with that.

22 THE COURT: Okay. That will be stricken.

23 A. Okay.

24 Q. Page 186 of the Economic Report of the
25 President --

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1 A. Right.

2 Q. -- said, "As with many products, advertising
3 mainly shifts consumers among brands." That's the
4 Economic Report of the President. Do you see that?

5 A. Yes, I do.

6 Q. So I repeat the question I asked before: Hasn't
7 the primary objective of the cigarette companies'
8 advertising been brand switching and brand loyalty?

9 A. I -- I would not agree with that conclusion.

10 Q. Okay.

11 A. I -- I --

12 My conclusion, based on my review of the
13 internal company documents which the people who are
14 writing these things did not have access to, is that
15 the role of -- of advertising was a part of the total

16 marketing and communications package, and that total
17 marketing and communications package had four
18 purposes and impacts in the marketplace.

19 Q. Based on your review of approximately 4,000 out
20 of 250,000 marketing documents that were produced, a
21 substantial percentage of which were ads; right?

22 MR. CIRESI: Your Honor, I'm going to
23 object to the form of the question. Counsel is
24 testifying.

25 THE COURT: Restate the question, counsel.

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1 MR. BLEAKLEY: I'll withdraw it, Your
2 Honor.

3 BY MR. BLEAKLEY:

4 Q. Now, we've talked about your opinion regarding
5 the objectives of what you describe as defendants'
6 total marketing and communications programs.
7 Yesterday you were asked whether or not your review
8 of the selected documents you saw permitted you to
9 conclude that the defendants' objective of keeping
10 people smoking had been successful. Do you remember
11 that?

12 A. I don't recall that question specifically, but
13 may -- maybe -- maybe I had -- was asked that one
14 specifically.

15 Q. You showed four documents that you said were
16 representative that showed the success of the
17 defendants' objectives. Do you remember that?

18 A. That was --

19 Are we referring to Marlboro, the two Newports
20 and -- I forget what the other one was now. Are
21 those the four you're referring to?

22 Q. B&W.

23 Those are the documents, yes.

24 A. But that was under the heading of inducing
25 people to start smoking,. --

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1 Q. I'm sorry, I misspoke.

2 A. -- not quit.

3 Q. Success in getting people to start. And you
4 cited those four documents.

5 A. I cited those four in particular, but I think it
6 comes out of the more general understanding of the
7 themes that you pick up in the -- in the documents.

8 Q. And your -- your testimony is that they're
9 representative; right?

10 A. I'm sorry, I couldn't hear you.

11 Q. Your testimony is that those four documents were
12 representative.

13 A. My testimony is that those four were
14 illustrations -- representative illustrations of the
15 general point.

16 Q. Now, have you done any research to permit you to
17 opine on the question of whether the communications
18 of the tobacco industry have had any impact on
19 smokers?

20 A. I would say that the analysis which -- which

21 I've done was directed to the issue of understanding
22 what those communications efforts were, how they fit
23 in with the rest of the elements of the total
24 marketing and communication package, what their
25 objectives were, what their impacts were.

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1 Q. Well let me restate the question then.
2 Apart from the approximately 4,000 documents
3 that you reviewed, have you done any research on the
4 effect or impact of defendants' communications
5 programs?

6 A. Well I set out for you yesterday what the
7 process was via which I did my research in this -- in
8 this case, and as I did mention, there were a number
9 of journal articles that I looked at. But again,
10 I'll reiterate what I said yesterday. My -- my
11 opinions in my expert report, which are the same
12 opinions that I express when I come to testify here,
13 were based on my review of the internal documents.

14 Q. Have you done any research on the attitudes and
15 beliefs of smokers about the health hazards of
16 smoking?

17 A. As -- as contained in the -- in the documents
18 that I -- that I reviewed, that was one of the issues
19 I looked at, yes.

20 Q. Apart from your review of approximately 4,000
21 selected documents, have you done any research on the
22 attitudes and beliefs of smokers about the health
23 hazards of smoking?

24 A. Well again, I -- I -- I guess I'm just a little
25 confused about --

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1 My previous answer -- I mean I've described --
2 We started out with me describing my research
3 process, and that research process covers the issue
4 of customers' -- of smokers' attitudes and beliefs
5 about the health hazards of smoking, so it comes from
6 the 4,000, actually 5400 documents that I've looked
7 at in this -- in this case.

8 Q. Have you reviewed any of the polls that have
9 been taken, either here in Minnesota or elsewhere,
10 about the beliefs and attitudes of smokers regarding
11 health hazards of smoking?

12 A. Well certainly contained within the -- the
13 documents which we -- we've referred to previously,
14 there were -- there were various polls in those -- in
15 those documents which I reviewed, and in the set of
16 documents that you sent to me to look at before my
17 testimony here there were more polls, and I reviewed
18 those.

19 Q. Did you do any sort of survey of smokers to
20 determine their beliefs or --

21 A. Did I?

22 Q. -- attitudes?

23 Yes, you.

24 A. Did I conduct my own survey?

25 Q. Yes.

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1 A. No, I did not conduct my own survey.
2 Q. Or have it conducted by anyone else?
3 A. No, I did not direct anyone else to conduct a
4 survey for me. There were a large number of
5 large-scale surveys which were -- which had already
6 been done.
7 Q. Have you done any research on Medicaid
8 recipients in Minnesota or elsewhere?
9 A. Well I've raised --
10 I've read the depositions of the Medicaid
11 recipients as the documents -- which are involved in
12 this case. Other than that I have not independently
13 conducted -- conducted research on them.
14 Q. And so you don't know what the beliefs and
15 attitudes about the health hazards of smoking there
16 are for Medicaid recipients.
17 A. Well I didn't say that at all.
18 Q. Well you do know?
19 A. Could I have a chance to answer my -- my -- my
20 question, to -- to deliver my question -- my answer?
21 Sorry.
22 Q. I apologize.
23 A. You know, I said I -- I read 13 Medicaid
24 depositions, and in there there are some beliefs for
25 those 13 people about their perceptions of the health

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1 hazards of smoking. That's what -- that's what I
2 did. Now, you know, if you want to characterize -- I
3 guess you can characterize that how you want, but
4 that's what I did. So does that give me -- is that a
5 broad sampling of Medicaid recipients? No. Is it
6 reading the 13 depositions that were available in
7 this case? Yes.
8 Q. Did you do any sort of review of the activities
9 of anti-smoking groups in Minnesota?
10 A. Again, I'm right where I was a minute ago, such
11 that it was in the documents which were part of the
12 set that I reviewed, I was aware of it, I paid
13 attention to it as I -- as I did my analysis. I did
14 not, again, did not go outside the documents which
15 we've already talked about in doing other research.
16 Q. Did you review any of the educational materials
17 used by the Minnesota public school systems to
18 educate the young people of Minnesota about the
19 health hazards of smoking and addictiveness?
20 A. I certainly am aware of -- of the -- of the
21 curriculum activities. I don't know that I went down
22 to the level of detail of looking exactly -- at
23 exactly what materials were used, but I -- I am aware
24 of those general -- of the existence of those general
25 efforts.

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1 Q. Have you made any effort to determine or to

2 estimate the impact of all of the activities of
3 anti-smoking groups, anti-smoking legislation, public
4 education?

5 A. Well certainly I did consider the -- as I
6 mentioned when we first started, that when you're
7 looking at your marketing and communications efforts,
8 you have to understand the information environment in
9 which they are taking place. So I generally try --
10 did try to have an assessment of -- to make an
11 assessment of what was going on, what was being said
12 by others about the industry as well as what was
13 being said by the manufacturers.

14 Q. The "information environment" is a term that
15 marketing experts use frequently; isn't it?

16 A. Well it's -- it's a term you hear around
17 marketing circles, right.

18 Q. And the -- I'm sorry. And the -- the
19 information environment refers to all of the sources
20 of information and knowledge that go into making up
21 people's beliefs and attitudes; isn't that right?

22 A. Yeah, that -- I think that's a fair
23 characterization. If you have -- they're targeting a
24 particular customer, you want to understand what's in
25 that person's mind, and, you know, what is shaping

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1 their attitudes and behaviors, so you would like to
2 be aware of all the kind of information that they're
3 processing.

4 Q. And you know for a fact that the Surgeon
5 General's reports have been widely publicized in the
6 press; right?

7 A. Well I -- I do know that they've been published
8 in newspapers and so forth. I'm not sure how many
9 16-year-olds are reading them as they're published in
10 the newspapers, but I -- I do know that the Surgeon
11 General's reports were generally reported upon in the
12 press, yes.

13 Q. You -- you don't know whether 16-year-olds did
14 or did not read the articles that appeared in the
15 newspapers; do you?

16 A. I have not conducted a survey, nor do I recall
17 seeing a survey of 16-year-olds' consumption of the
18 front page of the Minnesota newspapers as the Surgeon
19 General's report was written about.

20 Q. You do know, however, that 16-year-olds in the
21 state of Minnesota have been taught about the health
22 hazards of smoking and the addictiveness of smoking
23 for decades; don't you?

24 A. I do understand that there certainly has been a
25 history of health education, and particularly

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1 smoking, the health hazards associated with smoking
2 in the Minnesota schools. I don't know exactly what
3 period in time they were instituted and how they've
4 changed over time. But I certainly do know that
5 there was a long history of them within the state,
6 yes.

7 Q. And you do know that anti-smoking groups have
8 been very active in the state of Minnesota for a long
9 time, too; don't you?

10 A. I -- I don't really know too much of the details
11 of the extent of their activity, but I -- but I do
12 know that -- I did see in my review of the documents
13 that there were a number of anti-smoking groups which
14 were active, yes.

15 Q. And you do know that the polls that you have
16 reviewed show that virtually everyone in Minnesota
17 has believed that cigarette smoking is hazardous for
18 the last 25 years or so; do you not?

19 MR. CIRESI: Objection, that's a
20 misstatement of polls, and it's also counsel's
21 testifying.

22 THE COURT: Sustained.

23 Q. Now let's look at the other side of the coin
24 here. You talked yesterday about The Tobacco
25 Institute. Do you know how many people in Minnesota
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1 have ever seen a press release of The Tobacco
2 Institute?

3 A. Have ever seen a press release?

4 Q. Yes.

5 A. Gee, I would -- I don't -- I -- I don't know.
6 I'd be surprised if it were a lot since basically a
7 press release is given to the press to influence what
8 they write about an issue rather than distributed to
9 individuals.

10 Q. Do you know how many of the press releases given
11 to the press in Minnesota have been read by the
12 people of Minnesota?

13 A. I'll need that read back. I'm sorry. I missed
14 it.

15 Q. It was a clumsy question. Why don't I try a
16 different one.

17 A. Okay, fine.

18 Q. Okay?

19 You said that press releases from organizations
20 like The Tobacco Institute are given to the press;
21 right?

22 A. That's how I generally think of it.

23 Q. And then the press decides whether to print them
24 or not; right?

25 A. Well I don't think they so much print them as
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1 use the information in them in their article.

2 Q. Okay. Do you know how many have been reprinted
3 in exactly that form or any other form in newspapers
4 in the state of Minnesota?

5 A. I'm sorry -- I'm sorry, I -- I --

6 How many of them have been reprinted --

7 Q. Yes.

8 A. -- in that form or any other form?

9 Q. Yes. What I'm trying to get at is have you made
10 any effort to determine how effective what you call
11 the communications program of the tobacco industry

12 has been in the state of Minnesota?
13 A. Oh, particularly in the state of Minnesota.
14 Well my -- my analysis was really at the -- as I
15 looked at the marketing campaigns, the marketing --
16 total marketing/communications campaigns of the
17 cigarette industry, I really looked at the
18 national -- you know, kind of looked at it from a
19 national point of -- point of view. And by and large
20 the programs are -- you know, the sort of direction,
21 the strategies are national programs. I did not kind
22 of look down at the level of saying exactly -- I -- I
23 did not come down to the state level other -- other
24 than to understand what was going on in the state
25 along the dimensions that you talked about.

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1 Q. Well let's talk about the national level then.
2 A. Okay.
3 Q. Have you made any kind of systematic effort to
4 compare the communications from the tobacco industry
5 on smoking-and-health issues against all of the
6 information available to people from anti-smoking
7 groups, legislation, Surgeon General's reports,
8 polls, to compare the two to make any analysis of the
9 two?

10 MR. CIRESI: I'm going to object to the
11 form of the question. It's compound.

12 THE COURT: Yes, I think you're going to
13 have to rephrase that.

14 MR. BLEAKLEY: All right. I'll try to
15 rephrase it, Your Honor.

16 BY MR. BLEAKLEY:

17 Q. What I'm trying to get at is whether or not you
18 have sat down and taken all of the communications
19 that you learned about in reading your selected 4,000
20 documents and compared them to all of the other
21 information in the information environment that
22 people were receiving and make an analysis of it?
23 Have you done that?

24 A. I wouldn't say I compared them. What I did is
25 integrate them. I try to --

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CROSS-EXAMINATION - ROBERT J. DOLAN

8066

1 I don't say it's A versus B. I put A and B
2 together so that I get a total understanding.

3 Q. And how did you do that?

4 A. How did I do that?

5 Q. Yes. How did you do it?

6 A. Via my review and research in the, quote,
7 selected 4,000 documents.

8 Q. So we're back to the 4,000 selected documents;
9 right?

10 A. Yes. To use your terminology, yes.

11 Q. At least half of which were ads; --

12 MR. CIRESI: Your Honor, --

13 Q. -- correct?

14 MR. CIRESI: -- objection, now asked and
15 answered.

16 THE COURT: You can answer it again if you

17 want.
18 A. I believe the -- again, in -- in your counting
19 system of a one-page ad counts as a document and a
20 hundred-page marketing document, marketing plan
21 counts as a document, the majority of them were ads.
22 If you put them on a scale, as I said yesterday, the
23 ads would lose miserably to the other -- the non-ads.
24 MR. BLEAKLEY: I have no further questions,
25 Your Honor.

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8067

1 THE COURT: Should we take a break now,
2 or --
3 It's about time. Is that all right?
4 MR. CIRESI: Fine, Your Honor.
5 THE COURT: Why don't we take a short
6 recess.
7 THE CLERK: Court stands in recess.
8 (Recess taken.)
9 THE CLERK: All rise. Court is again in
10 session.
11 (Jury enters the courtroom.)
12 THE CLERK: Please be seated.
13 THE COURT: Counsel.
14 MR. CIRESI: Thank you, Your Honor.
15 REDIRECT EXAMINATION
16 BY MR. CIRESI:
17 Q. Good morning, professor.
18 A. Good morning, Mr. Ciresi.
19 MR. CIRESI: Good morning, ladies and
20 gentlemen.
21 (Collective "Good morning.")
22 Q. Professor, after your expert report, did you
23 look at additional documents?
24 A. I did. I continued my review and analysis.
25 Q. Okay. How many total documents did you look at?

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8068

1 A. Five thousand four hundred, I believe.
2 Q. Now are you aware of how many documents Mr.
3 Bible of Philip Morris looked at of his own
4 documents?
5 A. No, I don't know.
6 MR. BLEAKLEY: Objection, Your Honor,
7 that's not relevant.
8 THE COURT: Sustained.
9 Q. Can you direct your attention to Exhibit 12493,
10 which was the RJR presentation to the board of
11 directors of September 30, 1974. It's in volume one,
12 sir.
13 A. Yes.
14 Q. And you recall that Mr. Bleakley asked you a
15 series of questions regarding whether there was
16 anything in there about the target market after the
17 first six charts? Do you remember that?
18 A. I do recall that, yes.
19 Q. Can you direct your attention to the Bates
20 number page 1316.
21 Do you have that, sir?

22 A. I do.
23 Q. And that's the point where the reference was
24 made to the book store at Harvard Square. Do you see
25 that?

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8069

1 A. Right, I do. They're referring to Vantage
2 cigarettes.
3 Q. Correct. And do they talk about targeted
4 efforts, right below that, against young adults?
5 A. Right. Quite -- quite clearly, as you see
6 there, what they say, "Advertising spending has been
7 increased with more targeted efforts against young
8 adults." You know, clearly, clearly the young adults
9 being the target market.

10 Q. And right there in the next chart, chart 14, do
11 they talk about increased media efforts toward young
12 adults?

13 A. Yes, they do.

14 Q. Now Mr. Bleakley also asked you a number of
15 questions concerning the Surgeon General's report --
16 A. Right.

17 Q. -- of 1981. Do you recall that, sir?

18 A. I do.

19 Q. I believe that was in tab 45 of the defendants'
20 documents, if you could pull that up. Do you recall
21 that?

22 A. Yes. Oh, yes, I do.

23 Q. And was that the right tab? I wasn't sure if I
24 had that right.

25 A. Yes, that's the right tab.

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8070

1 Q. Now he directed your attention, I believe, to
2 pages 200 and page 18. Do you recall that?
3 A. I honestly don't recall the specific page
4 numbers, but that could well be.
5 Q. All right. If you take a look at page 200 and
6 page 18, could you just confirm that those are the
7 pages he directed your attention to?
8 A. Okay. Well 18, yes, I recognize that, and yeah,
9 200, yeah, right.

10 Q. Okay.

11 A. You refreshed my memory that those were the two
12 pages, yes.

13 Q. Now do you recall that you, in response to a
14 question, told him about the statements of the
15 Surgeon General over succeeding years with respect to
16 low tar and low nicotine cigarettes?

17 A. Yes, I recall that I did that.

18 Q. Okay. Could you go to the preface of the
19 Surgeon General's report there.

20 A. In tab 45?

21 Q. Yes.

22 A. Well I was looking for it earlier in response to
23 the direct -- to the cross-examination. I couldn't
24 find it.

25 Q. It's not there?

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8071

1 A. It doesn't seem to be here.
2 Q. All right. Well we'll put up the whole part
3 here. Could you put up preface? Maybe you could use
4 the -- the monitor right next to you.
5 A. I'll use this. Fine.
6 Q. Okay?
7 Now on the preface, which is part of the
8 complete 1981 Surgeon General's report, is there a
9 history provided by the Surgeon General with regard
10 to low tar and low nicotine?
11 A. Yes. Yes.
12 Q. All right. I'd like to direct your attention,
13 then, to the third paragraph of the preface where it
14 starts, "In 1966...", do you see that?
15 A. I do see that.
16 Q. Okay.
17 A. That's exactly what I was looking for earlier.
18 Q. I want to read some -- some parts of this.
19 "In 1966, the Public Health Service held that
20 'The preponderance of scientific evidence strongly
21 suggests that the lower the tar and nicotine content
22 of cigarette smoke, the less harmful would be the
23 effect.'" Do you see that?
24 A. I do.
25 Q. And you related to that on your direct -- or

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8072

1 cross-examination; did you not?
2 A. Yes, I did.
3 Q. The Surgeon General's report of 1981 then goes
4 on to state, "In 1979, the Public Health Service
5 confirmed this statement, citing new evidence, but
6 was more cautious. 'In presenting information on the
7 public,' I wrote in the Preface to the 1979 Report,
8 'three caveats are in order: consumers should be
9 advised to consider not only levels of tar and
10 nicotine but also, paren, (when the evidence becomes
11 available) levels of other tobacco smoke
12 constituents, including carbon monoxide. They should
13 be warned that, in shifting to a less hazardous
14 cigarette, they may in fact increase their hazard if
15 they begin smoking more cigarettes or inhaling more
16 deeply. And, most of all, they should be cautioned
17 that even the lowest yield of cigarettes presents
18 health hazards very much higher than would be
19 encountered if they smoked no cigarettes at all, and
20 that the single most effective way to reduce the
21 hazards associated with smoking is to quit.'"
22 Now, sir, in responding to questions by Mr.
23 Bleakley, did you give that chronology with regard to
24 the succeeding Surgeon General's reports?
25 A. The general spirit of that. I think I missed

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8073

1 the point about one of the caveats being to look at
2 things other than -- other than tar and nicotine.

3 But this was certainly the sense that I was trying to
4 convey in my answer.

5 Q. Okay. Now the '81 report goes on to state in
6 the preface, "In this 1981 Report, the Public Service
7 has reviewed the question again and in far greater
8 depth than before. Overall, our judgment is
9 unchanged from that of 1996 and '79; smokers who are
10 unwilling or as yet unable to quit are well advised
11 to switch to cigarettes yielding less tar and
12 nicotine, provided they do not increase their smoking
13 or change their smoking in other ways. But our new
14 review raises new questions and suggests an even more
15 cautious approach to the issue.

16 "Here are the basic findings of this Report:"

17 Now sir, the basic findings then are set forth
18 below there; is that correct?

19 A. That's correct.

20 Q. And these were some of the findings that you
21 related in your answer on cross-examination; correct?

22 A. Yes, they were.

23 Q. Okay. Number one, "There is no safe cigarette
24 and no safe level of consumption."

25 Number two, "Smoking cigarettes with lower
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1 yields of 'tar' and nicotine reduces the risk of lung
2 cancer and, to some extent, improves the smoker's
3 chance for longer life, provided there is no
4 compensatory increase in the amount smoked. However,
5 the benefits are minimal in comparison with giving up
6 cigarettes entirely. The single most effective way
7 to reduce hazards of smoking continues to be that of
8 quitting entirely."

9 Number three, "It is not clear what reductions
10 in risks may occur in the case of diseases other than
11 lung cancer. The evidence in the case of
12 cardiovascular disease is too limited to warrant a
13 conclusion, nor is there enough information on which
14 to base a judgment in the case of chronic obstructive
15 lung disease. In the case of smoking's effects on
16 the fetus and newborn, there is no evidence that
17 changing to a lower 'tar' and nicotine cigarette has
18 any effect at all on reducing risk."

19 Number five, "Smokers may increase the number of
20 cigarettes they smoke and inhale more deeply when
21 they switch to lower yield cigarettes. Compensatory
22 behavior may negate any advantage of the lower yield
23 product or even increase the health risk."

24 Six, "The 'tar' and nicotine yields obtained by
25 present testing methods do not correspond to the
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8075

1 dosages that the individual smokers receive: in some
2 cases they may seriously underestimate these
3 dosages."

4 Number seven, "A final question is unresolved,
5 whether the new cigarettes being produced today
6 introduce new risks through their design, filtering
7 mechanisms, tobacco ingredients, or additives. The

8 chief concern is additives. The Public Health
9 Service has been unable to assess the relative risks
10 of tobacco -- of cigarette additives because
11 information was not available from manufacturers as
12 to what these additives are."

13 Now sir, that also is part of the 1981 report?

14 A. That's a part of the entire report, yes.

15 Q. Okay. And can you direct your attention to page
16 seven of the 1981 report, and specifically to the
17 bottom, the second-to-the-last sentence. "As
18 discussed....," do you see that, sir?

19 A. I do.

20 Q. "As discussed in this report, the recent
21 reductions in 'tar' yield have been accomplished by
22 altering tobacco growth and processing and by changes
23 in cigarette manufacture. These changes may have
24 produced a 'tar' with a different composition from
25 that of old higher 'tar' cigarettes and may have

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REDIRECT EXAMINATION - ROBERT J. DOLAN

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1 changed the concentrations of some of the
2 constituents contained in the gas phase of the
3 smoke."

4 Now is that another part that you had read in
5 this Surgeon General's report?

6 A. It is.

7 Q. And can you direct your attention to page 99.

8 A. I don't have that page either.

9 Q. That's not either --

10 Okay. We'll put that up on the overhead. This
11 deals with flavor additives, and I -- I would direct
12 your attention to the last paragraph, and is it
13 reported there, "The exact delineation of the
14 chemical structure of the additives, their pyrolytic
15 products, the possible carcinogenic properties, and
16 the quantities found in smoke of lower 'tar'
17 cigarettes is urgently needed in order to assure the
18 customer that the filter, lower 'tar' and nicotine
19 cigarette does not carry additional or new health
20 risks." Do you see that?

21 A. I do.

22 Q. And earlier in this Surgeon General's report it
23 was reported that the defendants did not provide that
24 information; correct?

25 A. That's correct.

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REDIRECT EXAMINATION - ROBERT J. DOLAN

8077

1 Q. And finally, sir, can you direct your attention
2 to page 181 of the Surgeon General's report of 1981.

3 A. I have that one.

4 Q. And at the top of that page it talks about
5 compensatory smoking. Do you see that?

6 A. Yes, I do.

7 Q. Is it reported there in the 1981 report that,
8 "Compensatory smoking is central to the question of
9 the public health benefits of lower 'tar' and
10 nicotine cigarettes. The frequency and extent of
11 compensatory smoking should be measured in detail in
12 order to determine whether smokers who switch to

13 lower 'tar' and nicotine cigarettes actually inhale
14 fewer harmful compounds." Is that reported?

15 A. Yes, it is reported.

16 Q. And is that consistent with what you found in
17 your investigation, sir?

18 A. Yes, it was.

19 MR. CIRESI: I have no further questions.

20 Thank you, professor.

21 MR. BLEAKLEY: I have two questions.

22 THE COURT: Is this something -- an area
23 that's new?

24 MR. BLEAKLEY: Yes. Very short.

25 THE COURT: All right.

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RECROSS-EXAMINATION - ROBERT J. DOLAN

8078

1 RECROSS-EXAMINATION

2 BY MR. BLEAKLEY:

3 Q. Professor Dolan, this 1981 Surgeon General's
4 report was a public document; was it not?

5 A. I think so, yes.

6 Q. And widely published in the public press
7 throughout the United States; wasn't it?

8 A. Widely published in --

9 Q. Yes, widely reported in the public press
10 throughout the United States?

11 A. I believe it was.

12 MR. BLEAKLEY: That's all I have, Your
13 Honor.

14 MR. CIRESI: No further questions, Your
15 Honor.

16 THE COURT: You may step down.

17 THE WITNESS: Thank you, Your Honor.

18 (Witness excused.)

19 MR. GILL: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. GILL: The state of Minnesota and Blue
22 Cross Blue Shield call Professor Adam Jaffe.

23 (Witness sworn.)

24 THE CLERK: Please state your name and
25 spell your last name.

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DIRECT EXAMINATION - ADAM B. JAFFE

8079

1 THE WITNESS: My name is Adam B. as in
2 Benjamin, Jaffe, J-a-f-f-e.

3 THE CLERK: Thank you. You may be seated.

4 MR. GILL: Good morning, ladies and
5 gentlemen.

6 (Collective "Good morning.")

7 ADAM B. JAFFE

8 called as a witness, being first duly
9 sworn, was examined and testified s
10 follow:

11 DIRECT EXAMINATION

12 BY MR. GILL:

13 Q. Good morning, Professor Jaffe.

14 A. Good morning, Mr. Gill.

15 Q. Would you introduce yourself to the members of
16 the jury, please.

17 A. I'm Adam Jaffe.

18 Q. And where you live, Professor Jaffe?
19 A. I live just outside of [DELETED].
20 Q. And is your mike turned on, Professor Jaffe?
21 A. No, it is not.
22 How is that?
23 Q. That's much better.
24 I think you told us that you live just outside
25 of [DELETED]?

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DIRECT EXAMINATION - ADAM B. JAFFE

8080

1 A. That's correct.
2 Q. Are you married?
3 A. I am.
4 Q. And do you and your wife have any children?
5 A. Yes, I have a boy and a girl.
6 Q. And what do you do, Professor Jaffe, for a
7 living?
8 A. I'm professor of economics at Brandeis
9 University, which is just outside Boston, and I'm
10 also a partner in an economic consulting firm in the
11 Boston area.
12 Q. A little over a year ago, Professor Jaffe, did
13 you agree to review information concerning the
14 competitive behavior of defendants?
15 A. Yes, I did.
16 Q. And do you have in mind the issues that you'll
17 be addressing during your testimony?
18 A. Yes, I do.
19 Q. What are those issues?
20 A. Whether the defendants engaged in an antitrust
21 conspiracy to suppress fundamental competition in the
22 U.S. cigarette market with respect to the
23 smoking-and-health issue, and if so, whether that
24 conspiracy unreasonably restrained trade in that
25 market.

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8081

1 Q. All right. Professor Jaffe, I think you've
2 given us a mouthful. Let me see if we can break that
3 down a little bit in terms of some of the particular
4 terms that you used.
5 You first mentioned antitrust conspiracy. What
6 is an antitrust conspiracy?
7 A. From an economist's point of view, an antitrust
8 conspiracy is an agreement among the firms in an
9 industry to suppress or restrict competition among
10 themselves.
11 Q. And you mentioned "fundamental competition."
12 What type of competition is fundamental competition?
13 A. Well when I talked about fundamental competition
14 with respect to smoking and health, what I meant was
15 significant or important competition that would have
16 an effect on the market.
17 Q. And then you mentioned an "unreasonable
18 restraint of trade." What do you mean by that term?
19 A. Well an unreasonable restraint of trade is one
20 that has more than a minimal impact on the market and
21 which does not have any pro-competitive or legitimate
22 justifications.

23 Q. Now have you reached opinions in connection with
24 the issues of antitrust conspiracy and economic
25 impact?

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DIRECT EXAMINATION - ADAM B. JAFFE

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1 A. Yes, I have.

2 Q. All right. Before I ask you to explain your
3 opinions, I'd like to have you cover the
4 qualifications that you bring to the effort to
5 analyze the defendants' anti-competitive behavior.
6 Are you agreeable to doing that?

7 A. Okay.

8 Q. Let's start with your educational background.
9 Would you summarize that, please.

10 A. Yes. I did my undergraduate work in chemistry
11 at the Massachusetts Institute of Technology, and I
12 got that degree in 1976, and then I stayed at MIT and
13 got a master's degree in technology and policy from
14 MIT, and then did doctoral work in economics at
15 Harvard University, and I got the Ph.D. degree in
16 economics in 1985.

17 Q. And in connection with earning your doctorate
18 degree, I take it you were required to do a thesis or
19 a dissertation?

20 A. That's correct.

21 Q. What did your dissertation deal with?

22 A. My dissertation looked at the process of
23 research and development among firms in the private
24 sector in the U.S. economy.

25 Q. All right. Now in addition to doing your thesis
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DIRECT EXAMINATION - ADAM B. JAFFE

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1 work as you've just described, how else did your
2 educational background come into play in addressing
3 and analyzing issues of antitrust conspiracy and
4 economic impact?

5 A. Well my undergraduate science training in the
6 technology and policy degrees that I did prepared me
7 generally to look at the research process in the
8 private sector and its consequences, but then more
9 specifically in my Ph.D. work I focused on the areas
10 of antitrust economics as well as the economics of
11 research and development and innovation and its
12 consequences in the economy.

13 Q. All right. You introduced a new term to us in
14 that answer, "antitrust economics." What do you mean
15 by that term?

16 A. Well antitrust economics is a -- sort of a
17 broader subfield within economics in which economists
18 study competitive behavior, anti-competitive
19 behavior, or behavior that restricts competition in
20 many different forms, as well as the factors in a
21 particular industry that would be conducive to
22 competition, and on the other hand, the factors that
23 are conducive to restrictions of competition.

24 Q. So if I understand you correctly, antitrust
25 economics can refer to pro-competitive behavior or

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1 anti-competitive behavior.

2 A. That's correct.

3 Q. Let's move now to your professional background
4 and experience. Would you briefly summarize that,
5 please.

6 A. Yes. After getting my doctoral degree at
7 Harvard in 1985, I joined the faculty at Harvard in
8 the economics department and I taught at Harvard
9 until 1993, when I moved to my current position at
10 Brandeis University, where I teach in the economics
11 department at Brandeis.

12 During the time I was at Harvard for the
13 academic year 1990-'91, I was granted a -- an
14 academic leave of absence from Harvard because I was
15 asked to go to Washington to serve as a senior staff
16 economist at the President's Council of Economic
17 Advisors in Washington, D.C., which is the
18 organization that produces that report that we just
19 saw some excerpts discussed previously.

20 In addition to my academic appointments,
21 initially when I was at Harvard I began doing some
22 consulting work on the side relating to economics,
23 particularly in the areas of competition and
24 antitrust economics, and in the late 1980s I started
25 a consulting firm with another economist from

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DIRECT EXAMINATION - ADAM B. JAFFE

1 Harvard, which is called the Economics Resource Group
2 or ERG, and I continued through ERG to do consulting
3 for various organizations in the areas of -- of
4 economics. And finally as part of my academic
5 responsibilities, in addition to my work at Brandeis,
6 I'm the coordinator of a project at an organization
7 called the National Bureau of Economic Research,
8 which is a non-profit economics research organization
9 also in Boston, and I coordinate the project on
10 industrial technology and productivity at the
11 National Bureau of Economic Research, and I've done
12 that since 1993.

13 Q. All right, then, professor, let me ask you: How
14 specifically has that professional background that
15 you just recited qualified you to address the issues
16 of antitrust conspiracy and economic impact?

17 A. Well all of my professional work has really
18 focused on the areas of antitrust economics,
19 competitive behavior, anti-competitive behavior, as
20 well as the area of research and development and
21 innovation and interaction between the two, and I've
22 really focused on these two areas in my research in
23 my -- that is, in my academic research, in my
24 teaching, as well as in sort of the real-world work
25 that I've done through the consulting and the

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1 government work.

2 Q. Let me ask you if you can explain for us what
3 the relationship is between antitrust economics on

4 the one hand and your focus there, and new-product
5 innovation which you've mentioned several times.
6 A. Yes. Well there really --
7 The relationship goes in both directions. The
8 extent of competition and the nature of competition
9 in an industry is an important factor which affects
10 the way research is done and in particular how much
11 innovation, how much development of new products
12 there will be in an industry. And then conversely,
13 the process of innovation is itself an important
14 component of competition within industries. And so
15 there's a -- there's a -- a relationship that goes
16 from innovation to competition as well as a
17 relationship from competition to innovation.
18 Q. All right. And you mentioned that you have
19 focused on antitrust economics and new-product
20 innovation in several different forums; is that
21 correct?
22 A. Yes.
23 Q. All right. Let's go through those one at a time
24 and get a better idea of exactly where the focus has
25 been in those particular forums.

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1 First of all I heard you mention research. How
2 has your work on -- in the research area particularly
3 focused on these areas of antitrust economics and
4 new-product innovation?
5 A. Well as an academic researcher really for the
6 last 15 years or so, I have spent most of my time
7 studying the processes of innovation in the -- in
8 firms and how it relates to competition, reading
9 the -- the material that's been written by other
10 economists on the subject, and then really going out
11 and doing my own original research where I gathered
12 data in various forms on various different topics,
13 and I -- and I do research on the subject of research
14 and development and innovation and its relationship
15 to competition, and I've published many academic
16 papers on this topic in economics journals, and also
17 this project that I've coordinated at the National
18 Bureau of Economic Research, my role there really has
19 been to be in touch with economists all over the
20 country who are working on issues relating to
21 technology and productivity, organizing conferences
22 and that sort of thing related to that issue.
23 Q. So your own individual research or original
24 research has led to publications.
25 A. Yes.

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1 Q. And have these publications occurred in
2 peer-reviewed journals?
3 A. Most of them, yes.
4 Q. Approximately how many publications have you had
5 in peer-reviewed journals that related to the
6 subjects of antitrust economics and/or new-product
7 innovation?
8 A. Several dozen.

9 Q. In addition to publishing in peer-reviewed
10 journals, have you had any particular relationship
11 with peer-reviewed journals in other ways?
12 A. Yes. I'm a member of the board of editors of
13 the American Economic Review, which is, most
14 economists would agree, the leading American -- most
15 widely read American economics -- academic economics
16 journal, and as a member of the board of editors I
17 play a prominent role in reviewing papers submitted
18 by other people within my areas of expertise, which
19 are antitrust economics and -- and research and
20 development, and reviewing those papers, providing
21 advice to the -- the ultimate editor of the journal
22 regarding whether those papers should be published.
23 Q. In addition to that journal, have you served in
24 the capacity of a reviewer of peer-review submissions
25 for other economic journals?

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1 A. Yes. In economics they're called referees, and
2 I've served as a referee for probably eight or 10 of
3 the economics -- academic economics journals that
4 publish in the areas in which I have expertise.

5 Q. All right. You also mentioned that in your
6 teaching background at Harvard and at Brandeis, you
7 have focused on these areas of antitrust economics
8 and new-product innovation. How has that developed?

9 A. Well the courses that I've taught since 1985
10 have been in the areas of, first of all, what's
11 called microeconomics, which is more -- a broader
12 area within economics. It really refers to generally
13 the study of how firms and consumers interact in
14 particular markets and how that interaction affects
15 the amount of benefits that consumers derive from
16 particular products. And so microeconomics looks at
17 this interaction in particular markets as opposed to
18 macroeconomics, which is the study of what determines
19 the overall rate of inflation, the overall rate of
20 unemployment and things like that in the economy as a
21 whole. So I've taught courses in -- in
22 microeconomics. I've also taught courses at both the
23 undergraduate and the doctoral level in antitrust
24 economics, and I've taught courses in the economics
25 of research and development and innovation, the other

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1 major area of my expertise.

2 Q. What does a professor such as yourself have to
3 do to get ready to teach those types of courses?

4 A. Well you really do a fair amount of work. In
5 general, I would be familiar with the important
6 literature that already exists within a given area,
7 but what I would do would be to sit down with the
8 material that I know exists that people have written
9 within a given area and then try to organize it in a
10 way that I think is systematic and -- and most
11 susceptible to being digested by the students so that
12 I can prepare an outline and a syllabus for the
13 course.

14 Q. And finally with respect to your consulting
15 activities, how have they focused on the antitrust
16 economics and the innovations?
17 A. Well in consulting, what I've specifically done
18 is I've been asked by -- sometimes by law firms,
19 sometimes by companies or by government
20 organizations, to examine issues with regard to
21 various industries, and much of this work has related
22 to competition, often assessing how competitive a
23 particular industry is, assessing whether certain
24 behavior in a particular industry has been
25 anti-competitive, and assessing whether the

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1 structural conditions in a given industry or given
2 market are or are not conducive to competition or
3 conducive to anti-competitive behavior.

4 Q. You mentioned your work with respect to the
5 President's Council of Economic Advisors.

6 A. Yes.

7 Q. First of all let me ask you: Was that a
8 political appointment?

9 A. No. The -- the staff of the President's Council
10 of Economic Advisors are traditionally non-political.
11 The majority of them are academic economists like
12 myself who are brought in for a year or two in order
13 to give the members of the council who in turn advise
14 the president essentially objective economic advice
15 on issues of economic policy.

16 Q. What kinds of duties did you perform in that
17 role?

18 A. Well my --

19 The areas that I was responsible for when I was
20 at the council, not surprisingly, included technology
21 and science policy, and also policy relating to
22 competition, both with respect to legislative and
23 regulatory proposals involving the antitrust laws
24 themselves, and also regulatory issues in other
25 industries regarding regulatory efforts to promote

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1 competition.

2 Q. As someone who has specialized in the field of
3 antitrust economics, what is your understanding of
4 the purpose of the antitrust laws?

5 A. Well from an economist's point of view, the
6 purpose of the antitrust laws is to preserve
7 competition in industries and also to preserve for
8 consumers the benefits that competition normally
9 generates.

10 Q. Why is competition so desirable to consumers?

11 A. Well economists generally believe that
12 competition is desirable because, if we have an
13 industry in which the firms in that industry are
14 engaged in vigorous competition, that competition
15 will drive them to produce products that consumers
16 desire and to produce them in a way that is cost
17 effective, that -- that efficiently uses resources.
18 And therefore an industry that is competitive is an

19 industry that will, in general, deliver the maximum
20 benefits to consumers for the resources that are
21 being consumed by that industry in the production of
22 its products.

23 Q. Are there various aspects of competition?

24 A. Yes.

25 Q. Would you explain.

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1 A. Well there are -- there are a number of
2 different aspects to competition. I guess probably
3 the most obvious one is the price that firms charge
4 for the good or service that they sell. You'll often
5 see firms competing with other firms by trying, if
6 they can, to sell their product at a lower price in
7 order to garner a larger share of the sales in that
8 industry. So the price of a good is clearly one
9 aspect or dimension along which firms compete. But
10 it's not the only one. Firms will also compete with
11 respect to any attributes or characteristics of a
12 given product that are important to the consumers of
13 that product.

14 So if we were talking, for example, about
15 competition among auto companies, consumers compare
16 how durable, how reliable, how fuel-efficient, how
17 powerful, and also how safe the automobile is. These
18 are all characteristics or attributes of an
19 automobile that matters to consumers. And so the
20 firms in that industry, in addition to competing with
21 respect to price, will also compete with respect to
22 these particular attributes or characteristics that
23 consumers value. So these -- these product's
24 characteristics collectively are another aspect of
25 the competition typically among firms.

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1 Now this process of competition, particularly
2 with respect to these attributes or characteristics,
3 also generates information, so information is another
4 aspect of competition, if you will. The firms in the
5 industry, in an attempt to sell their products, in an
6 attempt to convince consumers that their products are
7 superior with respect to these characteristics that
8 consumers value, will generate information to
9 consumers about those products. They will tell the
10 consumers about the characteristics or the attributes
11 of the products that they sell, and so in this way
12 the process of competition among them with respect to
13 these attributes generates information for consumers
14 which, of course, the consumers need in order to make
15 informed choices, in order to decide, you know, do I
16 want to buy a Ford Taurus or do I want to buy a
17 Buick, they need to have information regarding all of
18 the different characteristics of those products that
19 are important to them. And in a normally functioning
20 industry, the process of competition will generate
21 that information so that consumers can make those
22 choices.

23 Now then the last sort of aspect of competition

24 that's important for the analysis in this case is the
25 notion of short-run competition versus long-run

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1 competition. So if we think of firms, just to stay
2 with the auto industry for a minute, if the firms are
3 competing on a very short-run basis, one of the
4 things a firm can do, for example, is offer a rebate,
5 you know, 500-dollar rebate on this model for the
6 next couple months if they want to increase their
7 sales over a short period of time. And so there are
8 certain aspects of competition that occur over this
9 relatively short time horizon involving the price and
10 some of the characteristics of the good over the
11 short run.

12 But the firms in an industry also compete on
13 sort of a long-term basis. At the same time that
14 they're trying to figure out how to sell more cars
15 tomorrow, they're trying to figure out what can I do
16 today that will allow me two years from now or five
17 years from now or 10 years from now to be selling
18 more cars than I do today, and hopefully more cars
19 than my competition. And this long-run competition
20 involves really a long-term, often expensive effort
21 to fundamentally change the nature of the products
22 that are being offered, to sell a car 10 years from
23 now that is significantly different from the cars
24 that are being sold today, or figure out a way of
25 making them that's significantly less expensive so

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1 that I can lower the price, and in that way over the
2 long term gain a really significant competitive
3 advantage over other firms.

4 Q. While in comparing, Professor Jaffe, short-term
5 competition with long-term competition, as an
6 economist, which type do you believe is more
7 beneficial to consumers?

8 A. Well over any significant time horizon, if we
9 look at a period, say, of -- of decades, I think most
10 economists would agree that the long-term competition
11 ultimately is much more important for consumers.
12 It's the long-term competition which allows really
13 quantum changes in what consumers can get out of the
14 economy.

15 And in fact there's an economist named Joseph
16 Schumpeter who's looked at this, and he coined a term
17 which is now widely used among economists for this
18 notion of long-term competition, he called it
19 "creative destruction," and the notion of creative
20 destruction is that when firms in an industry compete
21 over a long period of time, they're driven by their
22 urge to get ahead, to increase their market share, to
23 increase their profits. They're driven to create, to
24 come up with new ways of doing things that no one has
25 ever done before. Because it's only by coming up

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1 with a new way of doing things, a new product or a
 2 new way of making it or a new way of delivering it,
 3 that firms can really get a long-term advantage over
 4 their competitors.

5 So they're driven by their competitive instincts
 6 to this process of creation, or "innovation" is
 7 another word that Schumpeter used for the creation
 8 part of it. But at the same time, when a firm does
 9 that, when a firm succeeds in creating a new product,
 10 there is a destructive aspect of that which is that
 11 they destroy the market position of the current
 12 market leaders because a new and better product is
 13 going to undermine the sales of the existing
 14 products.

15 And so Schumpeter described creative destruction
 16 like a race that nobody ever wins. The firms are
 17 always trying to get ahead. And how do they try to
 18 get ahead? They try to get ahead by innovating, by
 19 creating. But you can never be permanently ahead
 20 because there's always some other firm behind you or
 21 next to you who is trying to do the same thing,
 22 trying to engage in this creative, innovative
 23 process, and one of these days, typically, if you're
 24 the market leader, one of these other firms is going
 25 to come up with something even better than what

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1 you've got and destroy your market position.

2 So we have this constant process of creation and
 3 destruction. Firms create new things and, in so
 4 doing, destroy the market position of the existing
 5 product. But of course consumers get the benefits of
 6 the creation and don't really need to worry about the
 7 destruction because they don't care that some other
 8 firm's profits have now been reduced.

9 And in fact the way Schumpeter and other
 10 economists have talked about it is the creative
 11 destruction is an engine of economic progress, it's
 12 the force which over time drives the economy forward.
 13 And in industry -- (clearing throat) excuse me --
 14 industry after industry or market after market over a
 15 long period of time will transform the market and
 16 deliver far greater benefits to consumers than was
 17 there before.

18 Q. Professor, do economists believe that an
 19 industry's research and development capability is
 20 important to the process of creative destruction?

21 A. Yes. Research and development in firms in a
 22 modern economy is to a significant extent the
 23 activity that they engage in in order to run this
 24 race, in order to try to innovate and get ahead.
 25 They -- they -- they hire scientists, they build

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1 laboratories, and they invest often very large sums
 2 of money in trying to figure out better ways of doing
 3 what has been done before in order to get ahead in
 4 this creative destruction race.

5 Q. Are there factors that economists such as
6 yourself have identified which would tend to promote
7 or foster this process of creative destruction that
8 ultimately benefits consumers?

9 A. Yes. As we -- as we just indicated in talking
10 about research and development, this -- this creative
11 destruction process requires money. Firms are making
12 long-term investments in order to try to get ahead,
13 and the more resources that they have available for
14 these long-term investments, the more competition
15 that there will typically be to try to win this race.

16 And this is not only an expensive process, but
17 it's a very risky process, because the way that you
18 engage in research is you try new things. Someone
19 has a good idea, you work on it, you invest money in
20 it, you develop it, you build a prototype, and
21 sometimes it doesn't work and you throw it away. Or
22 other times you invest, you develop it, you are
23 working on it, you think you're almost there, and
24 your competitor comes out with something even better
25 before you've even managed to get it to the point

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1 where you can deliver it. And so even if in some
2 technical sense it works, you still have to abandon
3 it because basically you've been preempted. So this
4 process of -- of research leading to creative
5 destruction is an expensive and a risky one, and
6 therefore one which requires significant resources in
7 order to undertake.

8 Now in addition -- in addition to resources,
9 I've been describing this as a long-term process, so
10 obviously it takes time. We can't expect through the
11 process of creative destruction to see an industry
12 transformed over night. It's typically -- it's a
13 process which takes years or decades as firms make
14 these long-term investments in research in order to
15 try to get ahead.

16 So money, time, and then the third thing that's
17 important, really, is the incentive or motivation to
18 engage in the contest. And as I've indicated, that
19 incentive will typically be there; firms always want
20 to get ahead of their competitors. But if you have
21 an industry where the market dynamics are such that
22 the stakes are really high, where there's perceived
23 to be a very significant -- some kind of transforming
24 event in the industry which makes it clear to
25 everyone in the industry that there are huge

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1 opportunities to use research to respond to consumer
2 demands, and that kind of high-stakes opportunity
3 will create an unusually large incentive or
4 motivation for this creative destruction process.

5 Q. Professor, can you cite for us any examples that
6 we might all be familiar with of how this process of
7 creative destruction has benefited consumers?

8 A. Sure. You really just have to look around the
9 courtroom. I mean -- or around your house. I mean

10 we see automobiles today that are far more
11 fuel-efficient, far more reliable and durable and
12 also much safer than automobiles just a couple
13 decades ago, and that has been brought about by
14 investments that automobile companies have made in
15 improving the technology in cars. And interestingly,
16 in the car industry, that process seems to have been
17 particularly accelerated in the late 1970s and '80s
18 when the competitiveness of the industry was
19 increased by the entry of Japanese and other foreign
20 competitors into the U.S. market, and that that -- it
21 was partially the force of that competition which
22 seems to have really spurred tremendous improvement
23 in -- in cars.

24 Computers, we all know about computers, they
25 didn't even exist a few decades ago. And what's

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1 interesting about computers is that the companies
2 which today are the market leaders in the computer
3 business also didn't exist decades ago, and the
4 companies that were the pioneers in the sale of
5 computers are companies you may not even have heard
6 of, companies like Sperry and Univac, who were
7 essentially driven out of the computer market by IBM
8 in the '60s and '70s, and then IBM in turn was not
9 exactly driven out of the computer market, but its
10 dominant position in the computer market was
11 significantly undermined when other firms came along
12 with PCs. So that now we have Compaq and Dell and
13 all these other companies that -- that have joined
14 or -- or surpassed IBM in sales of computers.

15 Q. Well what were the product attributes of the
16 computers that Sperry and Univac were distributing
17 decades ago?

18 A. Well they were able to process very large
19 amounts of information relative to what could be done
20 at the time, but of course they took up a whole room
21 and they were very, very -- they consumed a lot of
22 energy. And what they considered to be large amounts
23 of information we would laugh at today. I mean today
24 you have a computer sitting on your desk has many,
25 many times more information-processing capability

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1 than computers that filled an entire room in the
2 1960s.

3 Q. And what was the nature of the cost to acquire
4 one of those pioneering computers that Sperry and
5 Univac were marketing decades ago?

6 A. I don't know exactly, but it was tens of
7 thousands of dollars.

8 Q. And compared to today's computers, how has the
9 cost changed?

10 A. You can get one today for less than a thousand
11 dollars.

12 Q. And taking up about how much space?

13 A. Well, some of them are about yea big
14 (gesturing).

15 Q. Well, Professor Jaffe, if time and money and
16 motivation foster and promote the process of creative
17 destruction, have economists identified conditions
18 which would tend to inhibit, stymie, or frustrate
19 that process?

20 A. Well the conditions that are going to stymie the
21 process of creative destruction are essentially an
22 aversion to the risk that this dynamic race
23 represents for firms and a desire to try to maintain
24 the status quo. So that if we have the firms in an
25 industry looking at this possibility of a vigorous

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1 race, particularly in the kind of circumstance I
2 mentioned a minute ago where you have some kind of
3 transforming event that really shows the possibility
4 of a huge change in the industry, on the one hand
5 that's a very attractive prospect, particularly to
6 the firm that thinks they're going to win, but it's
7 also a very frightening prospect because, A, it's
8 very expensive, the firms are going to recognize that
9 once that race is begun it's going to consume
10 enormous resources on the part of all of the firms in
11 the industry, and they're not all going to win, some
12 of them are going to run that race and lose, and in
13 the process, having invested a lot of money which is
14 going to basically have gone down the tubes. So
15 there is going to be a reluctance typically, on the
16 part of at least some of the firms, to make that
17 leap, to take that chance. And if they have the
18 ability, if they have some mechanism to get together
19 and say, "Hey guys, this is really scary, this is
20 really risky, we could undermine everything we've
21 got, let's hold back," then that kind of agreement to
22 hold back could be what stymies the process of
23 creative destruction.

24 Q. And you describe that as a maintenance of the
25 status quo?

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1 A. Yes.

2 Q. Is the process that you just described something
3 that would fall into the category of anti-competitive
4 behavior?

5 A. Well if the firms individually should all just
6 happen to chicken out, then that would not be
7 anti-competitive behavior. But if they get together
8 and agree to hold back, to restrict this process of
9 long-term dynamic competition, this process of
10 creative destruction, then that is anti-competitive
11 behavior because they are restricting or suppressing
12 the competition that would otherwise occur among
13 them.

14 Q. Have you over the years studied various forms of
15 anti-competitive behavior?

16 A. Yes, I have.

17 Q. Which particular form of anti-competitive
18 behavior have you focused on in connection with this
19 case?

20 A. Well economists use the term "collusion" to
21 describe a situation where the firms in an industry
22 agree not to compete, agree to restrict or suppress
23 in some way what would otherwise be their natural
24 inclination to compete with each other, and so what I
25 have looked at in this case is the possibility of

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1 collusion.

2 Q. And how does collusion differ with the concept
3 of antitrust conspiracy which you previously
4 explained?

5 A. From an economist's point of view, those terms
6 are essentially interchangeable.

7 Q. How, then, would an economist such as yourself
8 go about performing an investigation as to the
9 possible existence of a collusive agreement in a
10 particular industry?

11 A. Well there are basically three steps that you
12 would want to go through. The first step is, from an
13 economist's point of view, to -- to define what we
14 would call the relevant market. So if we're going to
15 analyze an allegation of collusion with respect to a
16 particular set of firms, we need to define or
17 delineate what are the boundaries of the market in
18 which those firms compete so that we can then look at
19 the question of anti-competitive behavior. And when
20 we're looking at defining the boundaries of the
21 relevant market, there are two dimensions that we
22 think about. We need to define the boundaries in
23 terms of what products are included. So if we were
24 thinking about an allegation that the car dealers in
25 St. Paul were somehow suppressing competition, we

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1 would have to decide, well, is the market cars or is
2 the market cars and trucks or is it cars and trucks
3 and buses or is it cars and trucks and buses and
4 trains? We have to make a determination as to what
5 set of products is the set of products that are truly
6 competing with each other, and that's called the
7 product dimension of the relevant market.

8 Q. Professor, if I can interrupt for a moment, why
9 would that type of a distinction be so important to
10 the type of work that an economist would do in
11 connection with investigating a collusive agreement?

12 A. Well as we're going to talk about a little bit
13 more in a minute, the next step is going to be to
14 investigate whether the structure of the market is
15 such that it is plausible that collusion would have
16 occurred, and before we can get to sort of analyzing
17 the structure of the market, we just need to decide
18 what is the market that we're talking about in order
19 to proceed to the next step.

20 Q. Why would it make a difference, though, whether
21 the product, relevant product under analysis, would
22 be cars or cars and trucks?

23 A. Well it -- it may or it may not. But it could,
24 for example, affect the number of competitors, the

25 number of potential competitors, and it could affect
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1 the ability of the alleged -- firms that are
2 colluding to succeed in controlling competition
3 depending on exactly how large is the scope of the
4 market that would have to be controlled. And so the
5 principle that's followed in defining relevant market
6 is what we -- what we typically do is we would want
7 to define the smallest area, whether we're talking
8 about -- for example, with respect to products, the
9 smallest set of products which, if it were
10 controlled, if competition was suppressed, you could
11 succeed and you would not be frustrated by
12 competition from something that's outside the
13 boundaries.

14 So, for example, clearly, if we thought about a
15 hypothetical relevant market that consisted of red
16 cars, we would say well that can't be the right
17 relevant market because even if you control
18 everything about red cars, well people don't care
19 that much about the color. If you didn't control the
20 blue cars and the green cars and the orange cars and
21 the brown cars, you couldn't succeed in controlling
22 that market. So red cars is clearly too small.

23 At the other extreme, probably airplanes, even
24 though they're also a means for getting people
25 around, are not a substitute for cars. If you

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1 control the market for cars, you wouldn't really have
2 to worry about the fact that your efforts to control
3 the market for cars are somehow going to be
4 undermined by people buying airplanes. People don't
5 go out and buy an airplane for the same reasons they
6 buy a car.

7 Now in between it may be a closer call. It may
8 be a matter of judgment at what point the products
9 become poor-enough substitutes that they're not
10 competing with the products within the relevant
11 market. But that's the basic concept.

12 Q. So then the analysis in this particular analogy
13 would be: Would trucks be a conceivable substitute
14 for cars if someone had controlled the car market.

15 A. That's correct.

16 Q. Okay. How about with respect to the
17 geographical aspects of the relevant market, what's
18 involved there?

19 A. Right. So I -- I don't think I know -- remember
20 if I said this yet, but the second dimension of
21 relevant market, after you've figured out which
22 products would be included, is what is the geographic
23 scope of that market. So if we stay with the St.
24 Paul car dealers for -- for a moment, if there was an
25 allegation that the St. Paul car dealers were

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1 colluding and we were trying to assess that
2 allegation, one of the things we need to figure out
3 is: Is the market St. Paul? Or do St. Paul car
4 dealers, if they were hypothetically to collude, face
5 sufficient competition from Minneapolis car dealers
6 that you really couldn't successfully monopolize the
7 market just by controlling car dealers in St. Paul,
8 you'd really have to also control the car dealers in
9 Minneapolis?

10 And so there's an issue of what is the
11 geographic extent of the market. And again, the
12 principle that we would follow would be what is the
13 smallest geographic extent which, if you did control
14 it, would be sufficient to carry out an
15 anti-competitive purpose without that
16 anti-competitive purpose being significantly
17 undermined by competition from outside the boundaries
18 that you've drawn.

19 Q. All right. That's the relevant market.

20 A. Right.

21 Q. What other factors would economists analyze in
22 attempting to determine the possible existence of a
23 collusive agreement?

24 A. Okay. Well after analyzing -- after
25 establishing and defining a relevant market, the next
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1 step is to investigate the question of whether the
2 notion of collusion in this case is plausible, is
3 economically sensible. Does it make economic sense
4 that the firms in this particular industry would have
5 been likely to have even tried to engage in some kind
6 of collusive behavior?

7 Q. And what would you focus on in connection with
8 the analysis of plausibility?

9 A. Well with respect to plausibility there are now
10 three factors. The first is the market share or the
11 concentration of the firms in the industry, because
12 collusion essentially is an agreement to coordinate
13 our activities and -- and to suppress competition.
14 And if you've got lots and lots of firms, or the
15 firms involved in the collusion have very small
16 shares of the market, then -- (clearing throat)
17 excuse me -- it's just not plausible to think that
18 they would think that they could pull that off.

19 You couldn't imagine, for example, all of the
20 wheat farmers of America trying to get together and
21 somehow control the wheat market. There's just too
22 many of them and it would be too hard for them to --
23 to arrange that.

24 And so I mean when looking at the plausibility
25 of a conspiracy, we look at the market shares of the
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1 firms and the concentration of those market shares
2 among relatively few firms, and the larger are the
3 market shares and the more concentrated are the sales
4 among a small number of firms, the more plausible it
5 is that they might have engaged in collusion.

6 Q. If you could just clarify a bit, professor, the
7 relationship between this term "market share" on the
8 one hand versus your other term, "concentration" on
9 the other hand.

10 A. Yes. Market share refers to the sales of the
11 individual firm, what fraction of the market does an
12 individual firm have. And large market shares are
13 conducive to collusion, all else equal, and small
14 market shares make it less plausible.

15 Q. Simply because there are too many members of the
16 potential conspiracy to deal with?

17 A. That's correct.

18 Q. And then concentration --

19 A. A related -- a related concept, which is sort of
20 really another way of measuring the same thing, looks
21 at what fraction of the industry is controlled by
22 collectively some small number of firms. So market
23 share, you look at one firm or you look at each firm
24 individually, but when you look at concentration,
25 you're looking at the industry as a whole and you're

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1 asking how much of the sales in that industry as a
2 whole are controlled by a relatively small group of
3 firms.

4 Q. And again, the significance of that is what?

5 A. It's the same idea, it's really just another way
6 of looking at the same question, that if -- if a
7 large fraction of the sales in an industry are
8 controlled by a relatively small number of firms,
9 then, all else equal, it's more plausible that they
10 could get together and coordinate their activities
11 and reach some kind of agreement to suppress
12 competition. Whereas on the other hand, if
13 relatively little of the sales in the industry are
14 controlled by any one group of firms, then it's hard
15 to imagine how they would coordinate some kind of
16 collusive agreement.

17 Q. You mentioned, I believe, that there were three
18 factors to consider --

19 A. Right.

20 Q. -- in connection with plausibility. What is the
21 second factor?

22 A. Okay. So we talked about market share and
23 concentration. The second aspect of this -- of
24 plausibility is whether or not there are barriers to
25 entry in the industry. "Barriers to entry" is an

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1 economist's term. Now barrier to entry is something
2 which makes it hard for firms that are not currently
3 competing in a given market to enter that market if
4 there are profit opportunities in that market. So
5 the notion of a barrier to entry is, in general,
6 economists believe that if there's a market in which
7 firms are making a lot of money, and in particular if
8 firms are making sort of more money than firms
9 typically can expect to make, then that's going to
10 attract entry by new firms. New firms are going to

11 say, hey, that looks good to me. Those guys are
12 making a lot of money, so I'm going to come in and
13 I'm going to try to make money in that market. Now
14 if there are aspects of the structure of a market
15 that would make it hard for new entrants to come in
16 in that circumstance, then we call that a barrier to
17 entry.

18 Q. Can you provide us with some examples of these
19 barriers. Because you're not talking about a
20 physical barrier, obviously.

21 A. That's right, I'm talking about an economic
22 barrier. And it would be things like strong brand
23 loyalty among the existing products in an industry
24 makes it hard for someone in the outside to come in
25 with a new product if the consumers in this market

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1 are very loyal to the products that are already on
2 sale. Another example of a barrier to entry would be
3 the need to engage in large levels of advertising and
4 promotion in order to be successful in this industry,
5 because that means that if you're going to come in as
6 a newcomer, you're going to have to spend a lot of
7 money and you're going to have to spend that money
8 without necessarily knowing that you're going to be
9 successful in terms of getting into the industry, and
10 so that would be another example of a barrier to
11 entry.

12 Now the reason -- I haven't yet told you why
13 barriers to entry are important. The reason that the
14 barriers to entry enter into this analysis of the
15 plausibility of the conspiracy is because even if we
16 have the first factor, so we have an industry that's
17 concentrated where there's relatively few firms that
18 control the sales in the industry, if the barriers to
19 entry are low and they were to think about the
20 possibility of colluding, they would say to
21 themselves, well, we can control our behavior, there
22 aren't very many of us, we can coordinate that, but,
23 you know, even if we succeed, someone else is going
24 to just come in and compete against us, and so it's
25 not going to work, and so we probably shouldn't even

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1 bother.

2 And so what we would think from this
3 plausibility point of view would be that if we have
4 an industry with low barriers to entry, it's really
5 not very plausible that the firms would even attempt
6 to collude to begin with, because what they would
7 expect would be that if they tried to collude and
8 even if they sort of succeeded among themselves, that
9 that attempt would be undermined by the entry of new
10 firms that are not currently in the market.

11 Now on the other hand, if we have an industry
12 that has this first feature; that is, the sales are
13 concentrated and there are significant barriers to
14 entry so that you wouldn't really expect that other
15 firms not currently competing in that market would

16 come in, then we have a more plausible situation for
17 collusion because the firms might well say to
18 themselves we have a concentrated industry, we can
19 coordinate our activities, and we don't really have
20 to worry about competition from somebody else who's
21 not already in the market because the barriers to
22 entry are most likely going to keep them out.

23 Q. What then, professor, is the third factor to
24 consider with regard to plausibility?

25 A. Okay. The third factor related to plausibility
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1 is really one of motivation, one of economic
2 incentives. So if we're going to tell a story that
3 says the firms in this industry engaged in collusion,
4 then what we have to have is a situation where what
5 they would expect would be that if they didn't reach
6 any kind of agreement, there would be vigorous
7 competition; whereas if they reach an agreement, they
8 can suppress that competition and preserve the status
9 quo in a way that would be beneficial to the firms in
10 the industry.

11 So economists believe that, in general -- to
12 some extent it would be true in any market -- that
13 the firms in that market, if they could, would like
14 to get together and agree not to compete, because if
15 they can get together and agree not to compete, then
16 they could earn higher profits and they can have a
17 quiet life and they don't have to take the risks that
18 competition would normally pose in terms of who's
19 going to win and who's going to lose.

20 But that kind of normal baseline level of
21 incentive to engage in collusion can be greatly
22 enhanced when an industry faces a situation where the
23 incentive to compete is particularly strong and the
24 risks that that competition poses for the status quo
25 for the firms who, like the existing profit

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1 relationship in the industry, is particularly great.
2 So if you have a situation with some kind of, as
3 I put it a minute ago, transforming event, that
4 really presents the industry with a choice, a
5 situation where it's clear that there are tremendous
6 incentives to compete, but that that race, that
7 process of competition is really very risky, very
8 expensive, very dangerous to the firms that are
9 currently enjoying profits in the industry, then that
10 would be a situation in which there is a strong
11 motivation to engage in collusion.

12 Now that doesn't say that collusion happened.
13 All we're talking about now is whether it was
14 plausible. So -- but what we're saying is that if
15 you have this -- this very high-stakes situation
16 where there's a real tension between a tremendous
17 urge to compete but also a tremendous threat and risk
18 and expense that that race poses, then it would be
19 plausible that firms in the industry would collude to
20 avoid that competition if they could.

21 Q. Professor, do I infer correctly that
22 "transforming event" is the type of term that
23 economists use?
24 A. I'm not sure I'd call it a term of art in
25 economics, but all I meant was to use it to describe
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1 a situation where something happens in a market that
2 really has a big impact on the firms' perception of
3 their market opportunities.
4 Q. And would an external threat to the profits of
5 an industry qualify, as far as economists are
6 concerned, as a transforming event for purposes of
7 measuring the motivational plausibility of collusive
8 behavior?
9 A. I think an external threat that also has the
10 property that it contains within it an instigation to
11 compete, something that increases tremendously -- not
12 just a threat, but also creates an opportunity where
13 the firms in the industry would be inclined to
14 compete to go after that opportunity.

15 Q. Well I think most of us tend to think of threats
16 as bad things. In economic terms, is a threat a bad
17 thing?

18 A. Well a threat --
19 I guess it depends on who's being threatened. A
20 threat to the market position of the firms in an
21 industry could be a very good thing for consumers.
22 If what that threat does is set off this kind of
23 competitive race to improve the products in the
24 industry, then that could be a good thing from the
25 point of view of consumers.

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1 Q. All right. Now are there any additional factors
2 that economists would examine in connection with the
3 possible existence of a conspiracy? You've spoken
4 about relevant market, you've spoken about
5 plausibility.

6 A. Okay. So once we've defined the market and then
7 we've looked at these several different components of
8 the plausibility of collusion, if we conclude based
9 on that that it is plausible, that this is an
10 industry where collusion might have occurred, then
11 the final step would be to look at the evidence of
12 actual collusion in order to determine whether the
13 collusion that we decided was plausible did in fact
14 occur.

15 Q. In the relevant market.

16 A. Within the relevant market, yes.

17 Q. All right. What would be the considerations
18 that you would investigate or analyze in connection
19 with evidence of a collusive agreement?

20 A. Well broadly speaking there are sort of two
21 categories of evidence that I would look for as an
22 economist. The first thing I would look for would be
23 the extent to which the behavior of the firms in the
24 industry is consistent with competitive behavior as
25 opposed to it being consistent with a restriction of

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1 competitive behavior.
2 Q. So activities that would be inconsistent with
3 incentives to compete?
4 A. Would be evidence that collusion occurred,
5 that's correct.
6 Q. Anything else?
7 A. In addition to looking at competitive behavior
8 versus anti-competitive behavior, the other general
9 category we would look at would be simply evidence of
10 communication between firms that related to
11 competitive activities. Because if firms in an
12 industry are vigorously competing, then you would
13 expect they're not going to be talking to each other
14 about what they should or shouldn't be doing with
15 respect to these competitive activities. But if we
16 observe them talking to each other and telling each
17 other what to do and what not to do, and if we
18 observe firms listening when another firm tells them
19 what to do and what not to do, then that would be
20 another kind of -- of economic evidence that
21 collusion is going on.
22 Q. In investigating the possible existence of a
23 collusive agreement, are you looking for a document
24 that sets forth the nature of the collusive agreement
25 signed by the participants, dated, notarized?

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1 A. No. We would typically not expect that we're
2 going to see any kind of written agreement. And it
3 may well be that the -- the very nature of the
4 agreements and exactly what the agreement expects the
5 participants to do will be somewhat vague because
6 this is not something they're supposed to be doing.
7 And so we wouldn't expect, as a matter of economics,
8 people to create a paper trail in which they record
9 those kinds of activities.
10 Q. Let's move now, professor, to those activities
11 that you have specifically undertaken relative to
12 this case to enable yourself to reach opinions with
13 respect to the issues of antitrust conspiracy and
14 economic impact.

15 Would you tell us what you've done specific to
16 this case to prepare you for that analysis?

17 THE COURT: Counsel, this seems to be a new
18 subject. Maybe we'll recess for lunch and
19 reconvene --

20 MR. GILL: Fine, Your Honor.

21 THE COURT: -- at 1:30.

22 THE CLERK: Court stands in recess, to
23 reconvene at 1:30.

24 (Recess taken.)

25

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1

AFTERNOON SESSION.

2 THE CLERK: All rise. Court is again in
3 session.
4 (Jury enters the courtroom.)
5 THE CLERK: Please be seated.
6 THE COURT: Counsel.
7 MR. GILL: Thank you, Your Honor.
8 Good afternoon -- I'll turn my mike on.
9 BY MR. GILL:
10 Q. Good afternoon, Professor Jaffe.
11 A. Good afternoon.
12 MR. GILL: Good afternoon, ladies and
13 gentlemen.
14 (Collective "Good afternoon.")
15 Q. Professor Jaffe, when we broke or lunch, I think
16 the question that I had put to you was to explain to
17 the members of the jury the activities that you have
18 undertaken specifically related to this case that
19 have enabled you to form opinions with respect to the
20 issues of antitrust conspiracy and economic impact.
21 A. Okay. I started --
22 I guess a little over a year ago, I began by
23 reviewing published material about the tobacco
24 industry in the economic literature, historical
25 material that related to the industry to give me

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1 background, as well as published material about
2 anti-competitive behavior and relating to innovation
3 more generally in other industries, and then I
4 proceeded then to look at evidence from the record in
5 the case, including documents that were produced by
6 the defendants that were provided to me by the
7 attorneys, as well as depositions of the relevant
8 people relating to the topics that were the subject
9 of my testimony.

10 Q. Who were the relevant people whose depositions
11 you reviewed, or what types of people were relevant
12 as far as you were concerned, Professor Jaffe?

13 A. Yes. I believe I reviewed the depositions of
14 all of the individuals from the defendants who had
15 been involved in the research process, as well as
16 some others that came up along the way that were
17 related to topics that we're going to talk about
18 later on, the introduction of certain products, and
19 certain incidents that -- that were of interest to
20 me.

21 Q. Professor Jaffe, have you relied upon the
22 information that you obtained from the activities
23 that you just described, together with your
24 educational background and your professional training
25 and experience, in reaching and forming opinions in

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1 this case?

2 A. Yes, I have.

3 Q. Let me then ask you at this time, Professor
4 Jaffe, what opinion have you reached with respect to
5 whether or not the defendants engaged in an antitrust
6 conspiracy?

7 A. It's my opinion that the defendants engaged in
8 an antitrust conspiracy in the U.S. cigarette market
9 to suppress fundamental competition with respect to
10 smoking and health.

11 Q. Who were the participants in this conspiracy to
12 suppress fundamental competition in the United States
13 market with respect to the smoking-and-health issue?

14 A. The participants were Philip Morris, R. J.
15 Reynolds, Brown & Williamson, BATCo, B.A.T
16 Industries, American Tobacco, Lorillard, Liggett, The
17 Council for Tobacco Research, and The Tobacco
18 Institute.

19 Q. When did these various defendants participate in
20 this antitrust conspiracy to suppress fundamental
21 competition?

22 A. It's my opinion that the conspiracy began in
23 late 1953 and early 1954 with the events surrounding
24 the meetings at the Plaza Hotel and the issuance of
25 the Frank Statement, and at that time the domestic

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1 tobacco companies, with the exception of Liggett,
2 joined to form the initial conspiracy.

3 Q. And the domestic tobacco companies at that time
4 were?

5 A. Domestic tobacco companies were Philip Morris,
6 R. J. Reynolds, Brown & Williamson, American Tobacco,
7 Lorillard -- and Lorillard, in addition to Liggett,
8 who we've put to the side for the moment.

9 Q. All right. Please continue, then, with your
10 explanation of when these various participants joined
11 this conspiracy.

12 A. Yes. It's my opinion that The Council for
13 Tobacco Research joined the conspiracy with
14 essentially the creation of its predecessor, the
15 Tobacco Industry Research Committee, in 1954, that
16 The Tobacco Institute was part of a conspiracy from
17 its inception in the late 1950s, and that Brown &
18 Williamson's affiliated companies, BATCo and B.A.T
19 Industries, were part of the conspiracy, BATCo from
20 sometime near the initial participation of Brown &
21 Williamson in the conspiracy in the early 1950s, and
22 B.A.T Industry from its inception in its current form
23 in the mid-1970s.

24 Q. How long has this conspiracy been in progress,
25 professor?

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1 A. Well I haven't been able to find any evidence
2 that the conspiracy has ended, except that Liggett
3 appears to have left the conspiracy in connection
4 with its settlement of some of the litigation in the
5 last few years.

6 Q. The remainder of the defendants, in your
7 opinion, continue to be participants in the
8 conspiracy?

9 A. That's correct.

10 Q. Professor, based upon your review of the
11 internal documents, the review of the depositions

12 that you mentioned, have you been able to identify
13 any specific elements or components of the overall
14 conspiracy to suppress fundamental competition on the
15 smoking-and-health issues in the U.S. cigarette
16 market?

17 A. Yes, I have.

18 Q. Can you explain to the jury the various elements
19 or components of the overall conspiracy that you've
20 been able to identify.

21 A. Yes, I can. It would help me to do that if I
22 could use the flip chart there.

23 MR. GILL: May the witness come down, Your
24 Honor?

25 THE COURT: Yes, go ahead.

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1 MR. BLEAKLEY: Your Honor, may I --

2 MR. GILL: Let me just mention, Professor
3 Jaffe, as you do this, to try to position yourself in
4 such a way that all members of the jury can have
5 access to the flip chart.

6 THE WITNESS: Yes. And boy, I'm used to
7 using a blackboard, but I'll do my best.

8 A. Okay. So we're talking about the agreements to
9 suppress fundamental competition related to smoking
10 and health, and this agreement was complicated and
11 had a lot of different parts to it, but there appear
12 to have been four main elements of the conspiracy or
13 aspects of the conspiracy that I've identified in the
14 evidence.

15 And the first of those was an agreement for no
16 in-house animal research relating to smoking and
17 health, so that was the first component.

18 The second component was an agreement that the
19 companies would collectively engage in reassurance of
20 smokers and suppression of unfavorable research. And
21 what I mean here by "unfavorable research" is
22 research that would tend to confirm smokers' beliefs
23 or concerns regarding the adverse health consequences
24 of smoking.

25 The third component was an agreement that the
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1 companies would not engage in explicit warnings
2 unless compelled to do so by government agency.

3 Q. What do you mean by "explicit warnings?"

4 A. I can't write and talk at the same time, so just
5 give me one second.

6 Q. Fine.

7 A. No warnings unless compelled -- the notion was
8 that the companies would not themselves volunteer to
9 put a warning of some sort on the product that would
10 convey to consumers the health hazards of the
11 product.

12 Q. So an explicit warning would be a warning that
13 would be on the product itself?

14 A. On the product, yes. So that's three.

15 And then the last component was an agreement not
16 to engage in competitive exploitation of safer

17 products in a manner relying on consumers' health
18 fears. So as part of the effort to suppress this
19 fundamental competition with respect to smoking and
20 health there was an agreement that, to the extent
21 that any of the firms did develop safer products,
22 that they would not competitively exploit those
23 products in a way that would tend to exacerbate or
24 make worse consumers' -- or customers' fears about
25 the health consequences of cigarettes.

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1 Q. And professor, is it your position that you have
2 found evidence to support not only the broad
3 anti-competitive collusive agreement that you've
4 outlined at the top of that particular page of the
5 flip chart, but each of the various components?

6 A. Yes.

7 MR. GILL: Professor, before you resume
8 your seat on the witness stand, I'd like to mark this
9 as Trial Exhibit two thousand -- or 26077, and we
10 would offer that for illustrative purposes, Your
11 Honor.

12 MR. BLEAKLEY: No objection.

13 THE COURT: Court will receive twenty-six
14 thousand, that's 26077.

15 MR. GILL: Thank you. You can resume your
16 seat now, professor.

17 Q. All right, Professor Jaffe, at this time are you
18 prepared to discuss the basis or the reasons for the
19 opinions that you have just recited to the jury?

20 A. Yes.

21 Q. Let's begin, then, at the beginning. And as I
22 understand it, the first area of analysis would be
23 relevant market.

24 A. That's correct.

25 Q. You've spoken about that in general. Would you
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1 address it now in connection with this case.
2 A. Yes. Based on my analysis, it's my opinion that
3 the relevant market for assessing or analyzing the
4 allegations of the collusive behavior in this case
5 would be the United States cigarette market. So with
6 respect to the two dimensions that I discussed
7 earlier on the product dimension, it's my opinion
8 that the relevant market is cigarettes. And on the
9 geographic dimension it's my opinion that the
10 relevant geographic area is the United States market.
11 Q. Why cigarettes as opposed to some broader set of
12 products that relate to the tobacco plant?

13 A. Well as I indicated, the way that this issue was
14 approached is to identify the smallest market
15 definition, which, if it were successfully controlled
16 through anti-competitive behavior, would be able to
17 succeed in terms of that anti-competitive behavior,
18 and it's my opinion that cigarettes -- that -- that
19 other products such as, say, cigars or smoking
20 tobacco, or, say, smoking cessation products like
21 nicotine gums, are not sufficiently good substitutes

22 for cigarettes that they would provide a significant
23 competitive discipline if there were to be successful
24 anti-competitive behavior with respect to cigarettes.
25

So therefore, the appropriate conclusion is that
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1 the relevant market is the market for cigarettes.
2 Q. And what about, professor, with respect to your
3 determination that the geographical boundaries of the
4 conspiracy were the United States of America, on what
5 basis did you come to that conclusion?

6 A. Well I concluded that the -- the appropriate
7 boundaries for the relevant geographic market was the
8 United States because if the alleged conspirators did
9 succeed in controlling the United States cigarette
10 market through anti-competitive behavior, consumers,
11 purchasers, smokers in the U.S. would not be able to
12 undermine or avoid the consequences of that
13 anti-competitive behavior by purchasing cigarettes
14 that are not sold within the United States because
15 those products are not available to purchasers in the
16 U.S. to any significant degree.

17 Q. Did you analyze for purposes of the opinions you
18 formed in this case any broader geographical area
19 than the United States of America?

20 A. No, I didn't.

21 Q. Why not?

22 A. Well it wasn't necessary. Once I had decided
23 that the relevant market for assessing the allegation
24 regarding anti-competitive behavior of these
25 defendants was the U.S. cigarette market, it was not

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1 then necessary to examine what was going on in other
2 geographic areas. And I didn't have any significant
3 amount of information at my disposal about the nature
4 or extent of competition in cigarette markets outside
5 the United States.

6 Q. So will you be offering any opinions with
7 respect to the presence or absence of collusive
8 agreements involving cigarette industries beyond the
9 borders of the United States of America?

10 A. No, I won't.

11 Q. All right. The --

12 As I recall, the next circumstance that needs to
13 be considered with respect to examining the possible
14 existence of a collusive agreement would be the
15 plausibility.

16 A. That's correct.

17 Q. And I think you told us there were three factors
18 that would be considered in connection with
19 plausibility.

20 A. That's correct.

21 Q. Do I recall correctly that the first had to do
22 with market shares/concentration?

23 A. That's correct.

24 Q. What did you do to investigate the market share
25 and concentration within the United States cigarette

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1 industry?
2 A. Well the first thing I did was I looked at -- at
3 data, so-called Maxwell data which gives the sales of
4 the different individual cigarette companies over
5 time in the United States.
6 Q. What is the Maxwell data, as you understand it?
7 A. Maxwell data is the data that's collected by a
8 firm -- I -- I think there's actually an individual
9 named Mr. Maxwell who at least at some point in time
10 was involved in this, and it's data that is
11 commercially available and is widely relied upon in
12 terms of the sales of the particular cigarette
13 products.
14 Q. And over what time span did you review the
15 Maxwell reports?
16 A. I looked at Maxwell information for the period
17 from 1954 through 1994.
18 Q. And you concentrated on 1954 for what reason?
19 A. Because that's the period of time in which it
20 was alleged that the conspiracy began.
21 Q. And is it your understanding that the discovery
22 phase of this case closed in 1994?
23 A. Yes.
24 Q. So that was the end point?
25 A. That's correct.

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1 Q. Would you take a look at Exhibit 14985, please.
2 A. Yes, I have that.
3 Q. Would you identify that exhibit, please.
4 A. This is a printout of Maxwell sales information
5 for different cigarette companies for the period from
6 1925, I believe, through 1984.
7 Q. And then would you take a look at Exhibit 20264.
8 A. Yes, I have it.
9 Q. And can you identify that exhibit, please.
10 A. Yes. This is another Maxwell publication that
11 presents sales information regarding particular
12 cigarette products for the years 1992, '93 and '94.
13 Q. So those two exhibits cover essentially most of
14 that 40-year timeframe?
15 A. That's correct.
16 Q. Now do you have any understanding as to who uses
17 Maxwell report data?
18 A. It's my understanding that it's widely used by
19 people both in the industry and the advertising
20 industry who want to have information on sales of
21 particular cigarettes.
22 Q. By "people within the industry," are you talking
23 about the defendant cigarette companies?
24 A. Yes.
25 Q. And do you know of any other source to obtain

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1 market-share information that would be reliable with
2 respect to the market shares of the cigarette

3 industry between 1954 and 1994?
4 A. I don't know of any other practical or reliable
5 source of such information that I could have gotten
6 my hands on.

7 MR. GILL: All right. Your Honor, we will
8 offer Exhibits 14985 and 20264 under 803(24), based
9 upon the equivalent trustworthiness of this
10 particular data and the impracticability of supplying
11 this information through any other source.

12 MR. BLEAKLEY: Your Honor, we have no
13 objection to either of the exhibits. However, the
14 exhibit number that we have for the earlier of these
15 two is 14985.

16 MR. GILL: If I misspoke, Your Honor, I
17 apologize, it is 14985.

18 THE COURT: Court will receive 14985 and
19 20264.

20 BY MR. GILL:

21 Q. Now what did you do with all of that data that's
22 contained in those two thick reports?

23 A. Well I looked at the reports which give the
24 total sales of the individual companies in these
25 different years, and I used that to calculate on a

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1 percentage basis their shares of the market in
2 various years, including 1954 when the conspiracy is
3 alleged to have begun, and in 1994.

4 Q. Would you look at Exhibit 30229.

5 A. Yes, I have that.

6 Q. Can you identify that document, please.

7 A. This is an illustrative table that I put
8 together that shows the calculated market shares of
9 the domestic defendants in 1954 and 1994.

10 Q. And this exhibit was prepared under your
11 direction?

12 A. That's correct.

13 MR. GILL: Your Honor, we would offer for
14 illustrative purposes Exhibit 30229.

15 MR. BLEAKLEY: No objection.

16 THE COURT: Court will receive 30229.

17 BY MR. GILL:

18 Q. As you've indicated, Professor Jaffe, this
19 particular illustrative exhibit deals with
20 defendants' market shares?

21 A. That's correct.

22 Q. And you got two columns on the exhibit, 1954 and
23 1994?

24 A. That's correct.

25 Q. Why don't you explain the significance of the

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1 data that is set forth on this exhibit.

2 A. Well what this exhibit shows is that in both
3 years there were several of the defendants that had
4 very large market shares, and that collectively the
5 defendants controlled, in 1954, 99 percent of the
6 market, and in 1994, according to Maxwell,
7 essentially 100 percent of the U.S. cigarette market.

8 Q. What did you deduce from that particular
9 information?
10 A. What I deduced from that was that in terms of
11 the plausibility of collusion, as I discussed
12 earlier, we had here an industry where the market
13 shares of the -- the defendants were such that --
14 that it is in fact plausible that pollution -- excuse
15 me, collusion could have occurred because there is a
16 relatively small number of firms who collectively
17 control essentially all of the sales in the industry.
18 Q. Professor Jaffe, what did you do to investigate
19 the level of concentration within the U.S. tobacco --
20 within the U.S. cigarette industry between 1954 and
21 1992?

22 A. Well as -- as I discussed earlier, another way
23 of looking at this sort of market-share information
24 is to calculate the fraction of the sales in the
25 industry that are controlled by a relatively small

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1 number of firms. The -- the U.S. government, through
2 the Census Bureau, collects information on many
3 manufacturing industries and publishes what's called
4 a four firm concentration ratio, which is simply the
5 fraction of the sales in any given industry that is
6 accounted for by the four largest firms, and I looked
7 at data on these four firm concentration ratios for
8 the cigarette industry and for other industries to
9 compare it to.

10 Q. Why is four the magic number?

11 A. Four is not really a magic number. What
12 economics would say is you want to look at some
13 relatively small number in the United States. That's
14 the way the government collects and publishes the
15 information, is the so-called four firm concentration
16 ratio.

17 Q. So the U.S. government decided the number should
18 be four.

19 A. The U.S. government decided the number should be
20 four.

21 Q. All right. Would you take a look at Exhibit
22 1824, please.

23 A. Yes, I have that.

24 Q. Can you identify that exhibit.

25 A. This is the printout of data from the Census
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1 Bureau, from the census of manufacturers that
2 includes the so-called four firm concentration ratio
3 for a number of different industries for time periods
4 actually going all the way back to 1935, and up
5 through the most recent census which has been
6 completed, which is 1992.

7 Q. So there isn't information currently available
8 with respect to '94.

9 A. Well they do this census only every five years,
10 so there will never be information for '94. After
11 '92 -- I probably misspoke. They probably have
12 completed the 1997, but they won't publish it for

13 several years yet, so it's not yet available.
14 Q. So 1992 is the last -- latest data available.
15 A. That's correct.
16 Q. You said Census Bureau. Whose Census Bureau?
17 A. It's part of the U.S. government.
18 Q. And have you relied upon the information
19 contained in the report of the U.S. Census Bureau
20 with respect to concentration levels in industries
21 between the periods of 1994 and 1992?
22 A. I think you misspoke, 1954 and 1992. And the
23 answer is yes.
24 Q. Thank you, professor.

25 MR. GILL: We will offer Exhibit 1824.

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1 MR. BLEAKLEY: No objection.
2 THE COURT: Court will receive 1824.
3 BY MR. GILL:
4 Q. Now as I recall, Professor Jaffe, Exhibit 1824
5 is also a large, thick document; is it not?
6 A. That's correct.
7 Q. Does it specifically identify industries by
8 name?
9 A. No. The data in the exhibit, it's a printout of
10 data where the industries are identified by a
11 four-digit numeric code, which is referred to as the
12 Standard Industrial Classification or SIC code.
13 Q. And hopefully did our government provide an
14 index to the codes?
15 A. Yes. The government publishes a directory which
16 allows you to identify the names of the industries
17 that correspond to those particular four-digit codes.
18 Q. And how did you use the index in connection with
19 your work on this particular phase of the -- of this
20 case?
21 A. I used the index to look up the names of the
22 industries that I was interested in.
23 Q. And you were interested in identifying
24 specifically what?
25 A. Well what I've done is I've looked at the most

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1 concentrated industries in the United States in 1954
2 and in 1992 in order to compare the level of
3 concentration in the cigarette industry to other
4 industries to get a benchmark as to whether this is
5 highly concentrated or not.
6 Q. And once you had made that type of an
7 identification between 1954 and 1992, what did you do
8 with the information?
9 A. I prepared an illustrative exhibit that shows
10 the top -- the 10 most concentrated industries in
11 both of those years.
12 Q. All right. Would you take a look at Exhibit
13 30227, please.
14 A. Yes, I have that.
15 Q. Now does this contain the actual identification
16 of the various industries that made the top 10
17 list --

18 A. Yes.
19 Q. -- for both of those time periods?
20 A. Yes, it does.
21 Q. Have you personally verified that the
22 identification on Exhibit 30227 conforms to the
23 source code in Exhibit 1824?
24 A. That's correct.
25 MR. GILL: We'll offer, Your Honor, for
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1 illustrative purposes, Exhibit 30227.
2 MR. BLEAKLEY: No objection.
3 THE COURT: Court will receive 30227.
4 BY MR. GILL:
5 Q. Again I think it's fairly clear how this
6 particular exhibit has been formatted, Professor
7 Jaffe, in terms of 1954 information in the left
8 column and 1992 information in the right column.
9 Would you explain the significance of the information
10 set forth on this exhibit.
11 A. Yes. Well as I indicated in describing it, what
12 the 10 industries that are on the exhibit for each of
13 these years are are the 10 most concentrated
14 industries according to this four firm measure of
15 concentration in each of these two years, so you
16 could see, for example, in 1954 the most concentrated
17 industry in the census data was primary aluminum,
18 where four firms controlled the entire market, so the
19 four firm concentration measure was 100 percent, and
20 then as you move down from that you see 90 percent,
21 90 percent, 88 percent and so forth, and cigarettes
22 was number nine out of some 150 or so industries that
23 were analyzed in 1954, with 82 percent of the market
24 according to the census controlled by the four
25 largest firms.

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1 And then when we go over to 1992, you can see
2 that there's a slightly different list of industries.
3 The concentration of the cigarette industry has
4 increased, as the census department measures it, from
5 82 percent to 93 percent. Cigarettes have moved up
6 from the ninth most concentrated industry to the
7 fourth most concentrated industry out of over 400
8 that were analyzed in 1992.

9 And you'll also note that cigarette is the only
10 industry in the United States that was among the 10
11 most concentrated in 1954 that is still among the 10
12 most concentrated in 1992. And what this indicates
13 is, again, in terms of just this plausibility issue
14 of is it economically plausible that collusion could
15 have occurred in this industry, what this clearly
16 shows is we have one of the most concentrated
17 industries in the United States over the entire
18 relevant time period, and so my -- my opinion is that
19 it is plausible based on this market-share or
20 concentration consideration that collusion would have
21 occurred.
22 Q. Let's turn now to barriers to entry. That was

23 the second factor under plausibility.
24 A. Yes.
25 Q. All right. What was the nature of your analysis
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1 of the barriers-to-entry consideration in the
2 plausibility analysis?
3 A. Well the first thing I did was I just looked at
4 the -- the information I had about the industry in
5 the literature regarding the industry to see what
6 evidence there was that there were barriers to entry
7 regarding the cigarette industry, and what I
8 concluded was that there were significant barriers to
9 entry in the form primarily of brand loyalty that the
10 consumers in the industry have towards existing
11 products as well as the very large advertising and
12 marketing expenditures that are necessary to compete
13 in this industry which would have made it expensive
14 and risky for an outside firm to -- to enter this
15 industry if an entry opportunity had presented
16 itself.

17 Now in addition to looking at the evidence of
18 the actual barriers to entry, the other thing that I
19 considered was the fact that economists would
20 generally expect that if there were not barriers to
21 entry in a given industry, and if that industry has a
22 level of profitability over some extended period of
23 time which is higher than is typical for most
24 industries, that that profit opportunity would tend
25 to attract entry, we would tend to see new companies

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1 wanting to enter that industry, and if we don't
2 observe successful entry in an industry which is
3 highly profitable over an extended period of time,
4 then that in and of itself is evidence that there
5 must be some significant barriers to entry, because
6 if there weren't, somebody would have seen that
7 profit opportunity, somebody not currently in the
8 industry would have seen that profit opportunity and
9 attempted to exploit it.

10 And in the cigarette industry, what we have is
11 an industry which has been highly profitable
12 throughout the post-war period, the last four
13 decades, among the most profitable industries in the
14 United States, and yet there has been no significant
15 entry into this industry over -- over longer than a
16 four-decade period in which those profits have
17 persisted. And from an economic point of view, that
18 lack of entry in the face of significant profit
19 opportunities is itself evidence that there are
20 likely to be significant entry barriers in the
21 industry.

22 Q. The third factor with respect to plausibility
23 was motivation?

24 A. That's correct.

25 Q. And let me ask you, professor: Are we dealing,
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1 with respect to motivation, essentially with the
2 motivation that would have existed at the time the
3 conspiracy was formed?
4 A. Well we would want to look at the motivation at
5 the time the conspiracy was formed as well as how
6 that motivation would have played out over time, yes.
7 Q. And you came to the conclusion that this
8 conspiracy was formed in late 1953 and early 1954.
9 A. That's correct.
10 Q. Now can you compare the incentives to compete
11 that existed within this industry in late 1953 with
12 whatever -- whatever incentives may have existed to
13 conspire.
14 A. Yes. When I was talking earlier about the issue
15 of motivation, I talked about the fact that typically
16 there would be a motivation to compete and some --
17 and some incentive to suppress competition, but that
18 that tension could be exacerbated or heightened in a
19 situation where you have a large event affecting the
20 industry that raises the stakes for both competition
21 and for the desire to maintain the status quo. And
22 what we have in the cigarette industry in the early
23 '50s, culminating in -- in 1953, was a significant
24 increase in consumers' perceptions regarding the
25 health risk of cigarettes, and the industry was faced

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1 with a situation where, on the one hand, there was a
2 tremendous opportunity created because it was
3 understood that there was now a huge consumer demand
4 for a cigarette that would not be so harmful, and any
5 company that could produce such a thing would gain an
6 enormous competitive opportunity, so in terms of the
7 sort of race that I talked about, this was an event
8 which tremendously would have stimulated the desire
9 to begin that sort of race.

10 At the same time, that race would have been
11 extremely threatening to the participants of the
12 industry. They would have seen that that race, that
13 competition, would have, first of all, been very
14 expensive, would have been very risky, and would have
15 required ultimately the -- the acceptance of the
16 health hazards of the product which would have, for
17 any companies that didn't succeed in developing a
18 safer product, would have been a tremendous
19 competitive disadvantage to the firms in the
20 industry. So what we had in the early '50s was
21 precisely the kind of situation where there was a
22 huge tension between very high stakes that would tend
23 to drive competition while at the same time that
24 competition being extremely threatening to the status
25 quo in the industry, leading to a situation where

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1 there would be a large motivation, if possible, to
2 agree to suppress that competition, not to go down
3 that dangerous and risky road of fighting it out in

4 the marketplace, but rather to try to maintain the
5 status quo.

6 Q. Well in the absence of a collusive agreement, as
7 of late 1953, what type of competitive conduct would
8 you have expected to see occurring in this industry
9 in the subsequent decades?

10 A. I would have expected to see the companies in
11 the industry devoting large resources to trying to
12 develop a product that would satisfy what consumers
13 wanted, which was a cigarette that was not as harmful
14 as the products that were available on the market,
15 and I would have expected that they would have done
16 that in a highly competitive manner, racing to be the
17 first to develop such a product, and continually
18 striving to get ahead in terms of developing such
19 products.

20 Q. Well in order to reap the potential rewards that
21 the process of creative destruction offer, what type
22 of information would a competitor need to have in
23 order to convince consumers that they truly have come
24 up with a much better mousetrap?

25 A. Well essentially the firms would have had to
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1 have done research that would allow them to
2 demonstrate to consumers the superiority of their
3 product along the dimension that they were competing
4 for, which was the safety of the product. So they
5 would have had to have done scientific research,
6 first of all, to develop a cigarette product that was
7 less harmful, but then also to demonstrate via
8 scientific evidence that it was in fact less harmful
9 so that they could present that information to the
10 customers in the effort to get the customers to buy
11 the new superior product.

12 Q. In your review, Professor Jaffe, of the
13 industry's internal documents, did you find any
14 indication of any of the defendants focused on the
15 potential benefits that might accrue from an effort
16 at a long-term development of a safer cigarette?

17 A. Yes, I did.

18 Q. All right. Would you turn to Exhibit 11622.

19 A. 11622?

20 Q. 11662.

21 A. Ah.

22 Q. Sorry if I misspoke.

23 A. Okay, I have it.

24 Q. Professor Jaffe, this is a memorandum that was
25 produced from the files of Philip Morris. It is

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1 dated July 24, 1958, it is from a Mr. C. V. Mace to a
2 Dr. DuPuis, who was at that time the director of
3 research and development at Philip Morris. Have --

4 Is this one of the documents that you reviewed?

5 A. Yes.

6 Q. Is it one of the documents that you've relied
7 upon in forming your opinions?

8 A. Yes.

9 Q. Is it representative of other documents that
10 you've reviewed along the same lines?
11 A. Yes, it is.
12 MR. GILL: We'll offer, Your Honor, Exhibit
13 11662.
14 MR. BLEAKLEY: No objection.
15 THE COURT: Court will receive 11622.
16 BY MR. GILL:
17 Q. Now Professor Jaffe, right at the top of the
18 document --
19 THE COURT: Excuse me, counsel, it's 11662.
20 MR. GILL: That's correct, Your Honor, it
21 is 11662.
22 THE COURT: I made a mistake.
23 BY MR. GILL:
24 Q. Professor Jaffe, directing your attention to the
25 portion of the exhibit just below the addressee's
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1 name --
2 A. Yes, I see that.
3 Q. All right. The indication here is that the
4 exhibit concerns brief statements on a program to
5 produce a low delivery filter cigarette with flavor;
6 is that correct?
7 A. Brief comments, yes.
8 Q. Now does the author consider the implications of
9 short-term versus long-term research?
10 A. Yes, he does.
11 Q. And where does that occur?
12 A. In the second paragraph of the document, the
13 author lays out both a short-range and a long-range
14 program for -- for Philip Morris, and it says, "For
15 short range, let's concentrate on means to produce a
16 substantial reduction in tar delivery, even if it is
17 only across the board, since the chance is good that
18 any special irritants and/or carcinogen, if present,
19 would be reduced also." So that's the short-range
20 program that the author envisions. Which he then
21 contrasts in the next sentence --
22 Q. Before we go on, Professor Jaffe, based upon
23 your review of the internal documents of Philip
24 Morris, did Philip Morris proceed to develop such a
25 short-term program?

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1 A. Yes, they did.
2 Q. Please continue.
3 A. So in contrast to that short-range program, he
4 described a long-range program where he says "let's
5 study means for identifying carcinogenic substances
6 as well as all substances in cigarette smoke that are
7 irritating or are known to produce undesirable
8 physiological effects, and find means of removing
9 them. If the latter appears to be impossible, let's
10 develop a non-tobacco cigarette which doesn't have
11 them to begin with. Now, how should we go about it?"
12 Q. Does the author, Mr. Mace, answer his own
13 question further on in the document?

14 A. Yes, he -- he does propose an approach on page
15 two of the document at the top.

16 Q. All right. If you would turn to page two,
17 direct your attention to the top of page two, and how
18 does the author answer his own question at that
19 point?

20 A. Well he -- he lays out sort of a plan, at least
21 in general terms, where he says, "The long range
22 program would grow out of studies being carried out
23 by the fundamental filter group as well as the other
24 groups of the Research Division working on smoke
25 chemistry. The fundamental program could be

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1 broadened to include the study of tobacco additives
2 (catalyst), tobacco extraction and finally an all
3 synthetic aerosol to replace tobacco smoke, if
4 necessary. Simultaneously, other sections of the
5 Research Division should be making a strong effort to
6 develop means to evaluate the physiological effects
7 of smoking. Initial studies could be carried out
8 with animals or certain animal tissues known to be
9 irritated by cigarette smoke, and known to be
10 susceptible to cancer when exposed to known
11 carcinogens."

12 Q. Now this was occurring in July of 1958?

13 A. That's correct.

14 Q. How would the program that Mr. Mace is
15 suggesting at the top of page two have fit into the
16 process of creative destruction that you described
17 this morning?

18 A. Well I would read Mr. Mace as proposing that
19 Philip Morris should try to win this race, that
20 Philip Morris should commit itself on a long-term
21 basis to a fundamental solution to this health
22 problem, redesign the cigarette if possible, and if
23 not possible, something completely different that
24 would satisfy consumers by providing them with what
25 they want, which included a safe product.

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1 Q. Did Mr. Mace then go on to indicate how such a
2 program might be related to competition?

3 A. Yes, he does.

4 Q. Where does that occur, professor?

5 A. In the last paragraph of the document further
6 down the page, he says, "I know this sounds like a
7 wild program," and he's referring there, the wild
8 program being his long-range plan, "but I'll bet that
9 the first company to produce a cigarette claiming: a
10 substantial reduction (say 50 percent less than the
11 present Parliament and Kent) in tars and nicotine, or
12 an ersatz cigarette whose smoke contains no cigarette
13 tars" -- sorry, "contains no tobacco tars, and with
14 good smoking flavor, will take the market. Further,
15 if he has the intestinal fortitude to jump on the
16 other side of the fence (provided he has some
17 convincing experimental evidence to back him up) on
18 the issue of tobacco smoking and health, just look

19 what a wealth of ammunition would be at his
20 disposal."
21 Q. Professor, what is Mr. Mace discussing in that
22 last sentence that you just read?
23 A. Well what he's basically saying is not only that
24 he thinks Philip Morris should enter this race, but
25 what he is recognizing, first of all, was that to

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1 really win the race, they would have to have
2 experimental evidence showing that their product is
3 safer, and they would have to in some way jump on the
4 other side of the fence and be prepared to explain to
5 the customers, to the smokers, just why the product
6 was safer. But that if they were -- if they had the
7 guts to do that, then they would have tremendous
8 ammunition at their disposal.

9 So I guess where Schumpeter used the metaphor of
10 a race, he's adopting the metaphor of an all-out war.
11 But the concept is the same, that if they undertook
12 this long-range program and they had the data, the
13 experimental evidence to back up a successful outcome
14 of that program, that they would be able to destroy
15 their competition.

16 Q. Based upon your review of Philip Morris's
17 internal documents in this case, did Philip Morris
18 ever jump that fence?

19 A. No, they did not.

20 Q. Did Philip Morris ever conduct the long-term
21 research program suggested by Mr. Mace in July of
22 1958?

23 A. No, they did not.

24 Q. Did any of the other defendants consider the
25 gains in market share that might accrue from the

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1 development of a demonstrably safer cigarette?

2 A. Yes.

3 Q. All right. Would you look at 11 -- at Exhibit
4 14020, please.

5 Do you have that?

6 A. Yes, I do.

7 Q. All right. This is a document produced by
8 Lorillard; is that correct, Professor Jaffe?

9 A. That's correct.

10 Q. Its title is --

11 MR. BLEAKLEY: What's the number?

12 MR. GILL: 14020.

13 Q. The title of this document is "A REVIEW OF
14 ANIMAL STUDIES CONDUCTED AT BIO-RESEARCH CONSULTANTS
15 INC AND THE SLOAN-KETTERING MEMORIAL INSTITUTE;" is
16 that correct?

17 A. Yes.

18 Q. And it is dated May 25, 1966?

19 A. That's correct.

20 Q. And the author is Dr. A. W. Spears, who was
21 director of research and development at Lorillard at
22 that time.

23 A. That's correct.

24 Q. Did you rely on this document in forming your
25 opinions, Professor Jaffe?

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1 A. Yes.

2 Q. Is it consistent and representative of other
3 documents that you have reviewed on the subject of
4 potential market-share gains from the development of
5 a demonstrably safer cigarette?

6 A. Yes, it is.

7 MR. GILL: Your Honor, we will offer
8 Exhibit 14020.

9 MR. BLEAKLEY: No objection.

10 THE COURT: Court will receive 14020.

11 BY MR. GILL:

12 Q. All right. We just covered what appears on the
13 face page of Exhibit 14020; correct?

14 A. Yes.

15 Q. All right. Let's turn to the second page, and
16 what we have here is a letter that is from Dr.
17 Spears, based upon his signature on page six of the
18 letter; is that correct?

19 A. That's correct.

20 Q. And Dr. Spears' letter is addressed to Mr. J. E.
21 Bennett, who is the president of the P. Lorillard
22 Company in -- and the date of the letter is May 25,
23 1966; is that correct?

24 A. That's correct.

25 Q. The letter shows that Dr. Spears is down in

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1 Greensboro, North Carolina, and he's writing to the
2 president who's up on 42nd Street in New York City.

3 A. That's correct.

4 Q. And the subject, as we've indicated, is "A
5 REVIEW OF ANIMAL STUDIES CONDUCTED AT BIO-RESEARCH
6 CONSULTANTS INC AND THE SLOAN-KETTERING MEMORIAL
7 INSTITUTE;" correct?

8 A. Yes.

9 Q. All right. Now directing your attention to the
10 bottom of the first page, does Dr. Spears at that
11 point address the development of a demonstrably safer
12 cigarette?

13 A. Yes, he does. Beginning with the last sentence
14 on the page, he says, "It is thought that the
15 development of a cigarette, the smoke condensate from
16 which gives little or no tumorigenic response, would
17 be regarded as a highly significant development by
18 the scientific community." Then turning over to the
19 next page he continues, "Undoubtedly, such a product
20 would place the corporation in a highly enviable
21 position, and in the writer's opinion a two or
22 threefold increase in sales could result within a
23 short period."

24 Q. Professor, would that type of a gain in market
25 share be considered significant in economic terms?

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1 A. That would be a very significant increase in
 2 market share, yes.
 3 Q. Please continue.
 4 A. He goes on, "It is unrealistic to envision a
 5 cigarette sales monopoly, in that such a product
 6 would be effectively duplicated by competitors in a
 7 short time. On the other hand, if we fail to pursue
 8 this research and/or a competitor marketed a
 9 cigarette whose smoke condensate gave little
 10 tumorigenic response, the writer is of the opinion
 11 that a significant sales loss could result."
 12 Q. On this page of the letter, is Dr. Spears
 13 addressing the concept of fear of being left behind
 14 in some type of a competitive race?
 15 A. Yes. I mean basically he's got here both sides
 16 of the incentives to engage in competition; first he
 17 notes the large benefit of being the first to produce
 18 this product, and then he notes the significant risks
 19 of the company of being left behind if they do not
 20 pursue this and one of their competitors is
 21 successful in doing so. So he's identified both the
 22 need and the fear motivation for pursuing this kind
 23 of long-range development.
 24 Q. Based upon the documents that you've reviewed,
 25 did Lorillard pursue the long-term development of

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1 such a product?
 2 A. No, they did not.
 3 Q. Professor Jaffe, did you find other examples in
 4 which defendants' employees predicted that a safer
 5 cigarette would generate substantial gains in market
 6 share?
 7 A. Yes.
 8 Q. Would you turn to Exhibit 12509, please.
 9 A. I have it.
 10 Q. Is Exhibit 12509 a document that you've relied
 11 upon in forming your opinions?
 12 A. Yes, it is.
 13 Q. And is it also representative and consistent
 14 with other documents on the subject of market-share
 15 gains from the development of a safer cigarette?
 16 A. Yes, it is.
 17 MR. GILL: Your Honor, we move the
 18 admission of Exhibit 12509.
 19 MR. BLEAKLEY: No objection.
 20 THE COURT: Court will receive 12509.
 21 BY MR. GILL:
 22 Q. Now this is a document that was produced from
 23 the files of RJR; is that correct, Professor Jaffe?
 24 A. That's correct.
 25 Q. It is marked "SECRET?"

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1 A. Yes.
 2 Q. The date is March 14, 1983.
 3 A. Yes.
 4 Q. The subject in the upper left-hand corner is

5 "Events Likely to Occur Prior to 1993."
6 A. That's correct.
7 Q. And the author is R. A. Lloyd, Jr., and it is
8 addressed to Mr. Mike McKee; correct?
9 A. Yes.
10 Q. All right. Would you please direct your
11 attention to the second paragraph on the first page.
12 The author states, "The task you set for me was to
13 identify three external events which will impact the
14 tobacco industry and R. J. Reynolds within the next
15 ten years. The three that I have identified are
16 regulatory issues, smoking and health and social
17 acceptability."

18 In which of those three categories did the
19 author address the potential market gains of a safer
20 cigarette?

21 A. In the smoking and health category.
22 Q. If you turn to page two -- or actually page
23 three, I believe, the author deals with the category
24 of smoking and health on that page?
25 A. That's correct.

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1 Q. Okay. What does the author say about the
2 potential market-share gains of a safer cigarette?
3 A. Well first, if you'll notice at the end of that
4 first paragraph under the heading "Smoking and
5 Health," he notes that there have been patents that
6 have been granted or applied for by various companies
7 for smoking devices that implied increased safety,
8 and then he goes on in the next paragraph to refer to
9 the consequences of those devices. He says in the
10 second sentence of the paragraph, "The company which
11 can produce such products, which also supply a degree
12 of user satisfaction which approaches that of current
13 cigarette products, will become the dominant company
14 in the industry almost over night. It is reasonable
15 to assume that the company who introduces such a
16 product might capture as much as 25 share points in
17 the first year if supply could keep pace with demand.
18 RJR must be that company, even though we are
19 currently far behind a number of our competitors in
20 this area."

21 Q. What is your reaction to the author's
22 prediction?

23 A. Well once again he's predicting a -- a
24 tremendous competitive gain. Twenty-five share
25 points is -- that's 25 percent of the market, a

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1 quarter of the entire market, and I guess I would
2 agree that that would be -- make you the dominant
3 company in the industry, and he's suggesting that
4 that could be the results, if you could introduce one
5 of these products, if it also provided a degree of
6 smoking satisfaction.
7 Q. Now in order to achieve the market-share gain of
8 that magnitude, and assuming that a company was able
9 to develop a demonstrably safer product, would the

10 company have to do anything else in order to reap
11 those benefits?
12 A. Yes, it would have to make sure that consumers
13 understood that it had taken this one attribute of
14 the product, safety, and it had succeeded in
15 achieving a very significant improvement along that
16 attribute. Because if you solve the technical
17 problem of producing a less harmful product, but
18 consumers didn't understand that this very
19 significant improvement had occurred, then you're not
20 going to get the kind of large competitive advantage
21 that is discussed in this document or the other
22 documents.
23 Q. So if the product achieved a significant market
24 advantage with respect to the dimension of safety,
25 you're saying that the company that developed the

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1 product would have to exploit the safety issue in
2 connection with informing consumers about the
3 product.
4 A. That's right. Because otherwise consumers would
5 not be fully informed regarding why it is that this
6 product is superior to the alternatives.
7 Q. And based upon your review of RJR's documents,
8 did RJR ever embark upon a program to exploit the
9 advantages of the demonstrably safer cigarette?
10 A. No, they didn't.
11 Q. Professor, please sum up your conclusions with
12 respect to the motivation portion of your
13 plausibility analysis.
14 A. Well I think what we've seen in these documents
15 is that the companies did in fact perceive a
16 tremendous competitive advantage that could
17 potentially be gained through exploitation of the
18 smoking-and-health issue in a long-range program,
19 that they or individuals within the companies
20 contemplated undertaking such a program, but that
21 they also understood that such a program was a very
22 dangerous thing for the industry, that there would be
23 losers as well as winners, and that to effectuate
24 such a program they would have to have the guts to
25 tell customers, smokers, about the health effects of

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1 their products. And so I see a very strong
2 motivation for a conspiracy that would -- where --
3 where the firms would perceive that there was this
4 tremendous driving force which was going to push them
5 to compete, but that that competition would be
6 extremely dangerous from the industry's point of
7 view, and therefore they had a very strong motivation
8 to suppress that competition if they could figure out
9 how to do so.
10 Q. Let's move now to the evidence that you found
11 that supports your opinion that the defendants
12 engaged in a conspiracy to suppress fundamental
13 competition on the smoking-and-health issues. All
14 right?

15 A. Okay.
16 Q. First of all, let me ask you this, professor:
17 In reviewing the defendants' internal documents, did
18 you find any indication that any of the companies,
19 any of the defendants had established an antitrust
20 compliance program?

21 A. Yes, I did.

22 Q. Let's look, then, at Exhibit 13763. Now is this
23 one of the documents that you've relied upon in
24 support of your opinions, professor?

25 A. Yes, it is.

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1 MR. GILL: We'll offer Exhibit 13763, Your
2 Honor.

3 MR. BLEAKLEY: No objection.

4 THE COURT: Court will receive 13763.

5 BY MR. GILL:

6 Q. Now this is a document that was produced by
7 Brown & Williamson Tobacco Corporation?

8 A. That's correct.

9 Q. The date is April 1977, as indicated in the
10 upper right-hand corner?

11 A. That's correct.

12 Q. The title of the document is "ANTITRUST
13 COMPLIANCE PROGRAM?"

14 A. Yes.

15 Q. All right. Directing your attention to the
16 section in the middle of the first page that's
17 labeled "COMPANY POLICY," what's being discussed in
18 this section?

19 A. Well it says, "It is the policy of the Company
20 to conduct its operations in strict compliance with
21 all applicable antitrust and trade regulation laws.
22 The laws are based upon the principle of conserving
23 and encouraging a free and competitive marketplace --
24 a principle to which Brown & Williamson
25 wholeheartedly subscribes. The decisions made on

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1 behalf of this Company are to be without collusion,
2 agreement, or understanding with competitors. The
3 law requires a business to act alone in making
4 competitive decisions such as what to buy, how much
5 to pay, what to sell, how much to charge, with whom
6 to deal, et cetera."

7 Q. Do you agree, professor, with the author's
8 assessment of antitrust principles as set forth in
9 that particular portion of the document?

10 A. Yes.

11 Q. This is dated in April of 1977, as we've just
12 indicated. What type of changes would have occurred
13 in the antitrust laws between the early '50s, the
14 time when you believe this conspiracy was formed, and
15 the time that this document was drafted?

16 A. There were no major changes in the antitrust
17 laws that would have affected the principles that are
18 being articulated here in this document.

19 Q. So the author's assessment of the situation in

20 1977 would have been equally applicable to the
21 situation in late 1953?
22 A. That's correct.
23 Q. Now did Brown & Williamson issue any specific
24 directives to guide their employees with respect to
25 their compliance with the company's antitrust

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1 program?
2 A. Yes, those appear beginning on the next page.
3 Q. Okay. You go then to page two, there is a
4 section in the middle of the page labeled "SPECIFIC
5 DIRECTIVES," and then there's a subheading "Relations
6 with Competitors."
7 A. That's correct.
8 Q. All right. What did you find significant about
9 that particular section of this document?
10 A. Well it says there, right after the number one,
11 "No employee shall agree, expressly or by
12 implication, with a competitor in any way to limit or
13 restrict any of the following aspects of the
14 activities or strategies of Brown & Williamson or the
15 competitor:"

16 And then it goes on. There's a long list that
17 begins on that page and continues on the next page of
18 activities or strategies that are not supposed to be
19 discussed with competitors.

20 Q. Are any of the items on that list relevant to
21 the analysis that you've made?
22 A. Yes. For example, I guess about the fourth or
23 fifth one in the list on that first page, it says
24 "Product or service offerings." So a product
25 offering of Brown & Williamson would be, you know,

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1 its -- its various cigarette products. And then on
2 the next page, I guess about halfway down the
3 continuation of the list on the next page, it
4 indicates "Sales or promotional plans or activities"
5 as a kind of activity or strategy of Brown &
6 Williamson that employees are not supposed to discuss
7 with competitors.

8 Q. Based upon your review of internal documents and
9 the depositions that you reviewed, did Brown &
10 Williamson comply with its own antitrust compliance
11 program?

12 A. No, it didn't.
13 Q. Did you find any documents, Professor Jaffe,
14 that addressed the formation of the conspiracy?
15 A. Yes, I did.

16 Q. Would you turn, then, to Exhibit 18905.
17 A. I have it.
18 Q. This is a document that's already been admitted
19 into evidence that the jury has seen a number of
20 times. This is one of two Hill Knowlton memoranda;
21 is that correct?
22 A. That's correct.
23 Q. And this one is dated December 15, 1953 in the
24 upper right-hand corner; is that correct?

25 A. Yes.

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1 Q. All right. And is it your understanding that
2 the author of this document, as indicated on the last
3 page of the document, is Bert Goss, Hill Knowlton?

4 A. Yes.

5 Q. All right. And the title is "BACKGROUND
6 MATERIAL ON THE CIGARETTE INDUSTRY CLIENT."

7 A. Yes.

8 Q. What's the significance of this document and the
9 other Hill Knowlton document with respect to the
10 opinions that you've formed?

11 A. Well these two documents taken together
12 essentially provide a description of the events in --
13 beginning in December of 1953 at which the defendants
14 agreed to conspire, and actually provides an
15 explanation in significant ways of why they did it as
16 well as in effect a blueprint that was significantly
17 carried out over the subsequent several decades.

18 Q. Under the section that's labeled "Participants,"
19 did Mr. Goss provide some historical perspective on
20 the cigarette industry?

21 A. Yes. In the first paragraph there he talks
22 about the fact that the industry was getting together
23 to discuss this, and that they had not had such
24 discussions in the recent history, at least partly
25 because of the antitrust cases that had previously

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1 been brought against the tobacco industry.

2 Q. Now it goes on to state in that section, in the
3 third paragraph, "The group was called together by
4 Mr. Paul Hahan, President of American Tobacco
5 Company. The chief executive officers of all the
6 leading companies - R. J. Reynolds, Philip Morris,
7 Benson & Hedges, U.S. Tobacco Company, Brown &
8 Williamson - have agreed to go along with a public
9 relations program on the health issue."

10 Did I read that correctly?

11 A. Yes.

12 Q. All right. Now what significance, if any, do
13 you draw from that particular information, that they
14 had agreed to go along with the public relations
15 program? Would that have been anti-competitive?

16 A. No. If that's all that they had agreed to, that
17 would not necessarily have been anti-competitive.

18 Q. Why not?

19 A. Well anti-competitive means activities that
20 restrict competition, and if they had merely been
21 involved in a -- in a collective or cooperative
22 effort regarding public relations and had not reached
23 any agreements that restricted or suppressed their
24 competitive activities, then that would not have been
25 anti-competitive.

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1 Q. All right. Let's go on to the next paragraph.
2 It reads, "Liggett & Myers is not participating in
3 the organization because the company feels that the
4 proper procedure is to ignore the whole controversy."
5 Essentially describing a head-in-the-sand approach?

6 A. Yes. I mean what they're saying is that Liggett
7 & Myers is not participating. However, if Liggett &
8 Myers is going to ignore the whole controversy, then
9 the companies that were there presumably would not
10 have had too much fear that Liggett & Myers was about
11 to take off on significant competitive activities
12 that were going to undermine any agreement by the
13 companies that were there.

14 Q. So the level of threat posed by Liggett & Myers'
15 abstinence from the conspiracy at the beginning was
16 what?

17 A. Well the level of threat was low, because what
18 it's saying is that although they're not
19 participating, it appears that what they were doing
20 was ignoring the whole situation, so they would not
21 pose at least at that point in time a significant
22 threat.

23 Q. And you previously told us that, in your
24 opinion, Liggett subsequently joined the conspiracy.

25 A. Yes.

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1 Q. All right. Directing your attention to the
2 bottom of page one of Exhibit 18905, under
3 "Organization," it states, "Because of the antitrust
4 background, the companies do not favor the
5 incorporation of a formal association. Instead, they
6 prefer strongly the organization of an informal
7 committee which will be specifically charged with the
8 public relations function and readily identified as
9 such."

10 Then going on to the next page, it continues,
11 "For example, Mr. Hahn reported that one name they
12 had considered was the "Tobacco Industry Committee
13 for Public Information." John Hill suggested that he
14 felt the word "research" should appear along with the
15 "information" in the title of the committee".

16 Now as you understand it, what committee is
17 being discussed here?

18 A. Well they're -- they're discussing the formation
19 of a committee which eventually took the form of the
20 TIRC, or Tobacco Industry Research Committee.

21 Q. Now directing your attention further down on
22 page two under the heading "The Industry's Position"
23 to the very last sentence of that particular section,
24 it reads, "Each of the company presidents attending
25 emphasized the fact that they consider the program to

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1 be a long-term one." See that?

2 A. Yes.

3 Q. In your opinion, Professor Jaffee, would the
4 44-year history and tenure of the TIRC, later changed
5 to the CTR, have qualified with respect to an

6 estimate that the presidents were prepared to engage
7 in a long-term program?

8 A. Yes.

9 Q. All right. If you turn to the next page,
10 starting on this page there are a series of questions
11 and answers that apparently were posed by the staff
12 of Hill & Knowlton and responded to by the industry
13 executives. Is that your understanding?

14 A. That's my understanding.

15 Q. All right. In approximately the middle of the
16 page there is a question that starts out, "Do the
17 companies consider that their own advertising and
18 competitive practices have been a principal factor in
19 creating a health problem?" Do you see that?

20 A. Yes.

21 Q. Then the author states, "The companies
22 voluntarily admitted this to be the case even before
23 the question was asked. They have informally talked
24 over the problem and will try to do something about
25 it. They do, however, point out that this is the one

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1 important public relations activity that might very
2 clearly fall within the purview of the antitrust
3 act."

4 What is the significance of that question and
5 answer with respect to the opinions that you have
6 formed in this case, Professor Jaffe?

7 A. Well what we have here is just an
8 extraordinarily clear statement as to what was going
9 on. First of all, do the companies consider that
10 advertising and competitive practices are creating a
11 health problem? Now of course from their point of
12 view the health problem is not that cigarettes are
13 harmful, the health problem is that their business is
14 threatened. That's the problem that they're trying
15 to solve here. And what they're worried about or
16 what they're recognizing is that their own
17 advertising and competitive practices, including, for
18 example, the ads that Professor Dolan discussed
19 yesterday with their health claims that were
20 reinforcing consumers' beliefs that cigarettes were
21 harmful, they're saying this is a principal factor
22 creating the problem that we face as an industry.
23 The companies voluntarily admitted this to be the
24 case, and then it goes on to say they've talked about
25 it, they recognize it is a problem, and they're going

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1 to do something about it.

2 Well what are they going to do about it?
3 Presumably whatever they're going to do about it,
4 having talked it over informally among themselves, is
5 not a competitive response. I mean we saw in the
6 Brown & Williamson document that you're not even
7 supposed to discuss these things with competitors,
8 let alone get together with your competitors and
9 agree to do something about it.

10 So what we have here, through the fact that Hill

11 & Knowlton recorded these discussions, we have really
12 an amazingly clear description of the companies in an
13 industry getting together and agreeing to suppress
14 competition.

15 Q. The Hill & Knowlton memorandum with regard to
16 the antitrust compliance program, that was directed
17 to the employees; correct?

18 A. You said "Hill & Knowlton." You meant Brown &
19 Williamson.

20 Q. I did.

21 The Brown & Williamson memo with regard to the
22 antitrust compliance program, that was directed to
23 all of its employees; correct?

24 A. That's correct.

25 Q. Of course, even the president of the company is
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1 an employee; true?

2 A. Yes.

3 Q. With respect to the conduct that has been
4 memorialized on this page of this exhibit, does any
5 of that conduct fit or comply with the program set
6 out in the Brown & Williamson memo to avoid antitrust
7 problems?

8 A. It doesn't comply with the Brown & Williamson
9 type of guidelines, and it's -- I can't imagine an
10 explanation of this kind of behavior that would be
11 innocent or -- or involve competition rather than
12 suppression of competition.

13 Q. Let me direct your attention, then, Professor
14 Jaffe, to the bottom of the same page. There's one
15 more question and answer there. The question reads:
16 "Do the companies view this problem as being
17 extremely serious and worthy of drastic action?"

18 And the answer is, "The answer is obvious since
19 the companies have not met together for the first
20 time" --

21 Excuse me. "The answer is -- The answer is
22 obvious since the companies have met together for the
23 first time since 1939, since they have promptly
24 proceeded to retain Hill & Knowlton, and are already
25 considering such expensive techniques as the use of

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1 institutional advertising. They recognize the
2 possibility that it might be desirable to use
3 institutional advertising to promote the basic
4 statement."

5 And then it continues on the next page, "As
6 another indication of how serious the problem is, the
7 officials stated that salesmen in the industry are
8 frantically alarmed and that the decline in tobacco
9 stock on the stock exchange market has caused grave
10 concern, especially since tobacco earnings will be
11 much higher next year because of the termination of
12 excess profits taxes."

13 Now how does the seriousness of the perceived
14 problem impact competitive motivation?

15 A. Well I think what this shows is that the people

16 meeting in 1953 clearly perceived the kind of
17 transforming event that I talked about a little while
18 ago. Here was a situation where the stakes were
19 extremely high while the urge to compete was very
20 strong. This was also a situation fraught with
21 tremendous danger for the companies, and therefore
22 one in which they would have had a strong motivation
23 to conspire, if they could, to maintain the status
24 quo.

25 Q. Let's go, then, to the other Hill Knowlton
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1 memoranda, that's Exhibit 18904, which is also
2 already in evidence.

3 A. I have it.

4 Q. All right. The second Hill Knowlton memo is
5 addressed to the members of the planning committee;
6 correct?

7 A. That's correct.

8 Q. It is entitled "FORWARDING MEMORANDUM."

9 A. Yes.

10 Q. The author is apparently unknown. There are no
11 authors listed on this document; correct?

12 A. Yes, that's correct.

13 Q. Now does this particular memo also discuss
14 suggestions for industry strategy?

15 A. Yes, it does.

16 Q. Okay. Let's turn, then, to the second page.
17 And first, in order to establish some timeframe here,
18 do you see at the top of this page that the author
19 states, "The attitude of the men we must directly
20 deal with in the industry is at once interesting, and
21 important for us to understand. That is why notes on
22 the four interviews with 'research directors' are
23 given at some length."

24 Do you recall that the first Hill Knowlton memo
25 that was dated December 15, 1953, contained some
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1 language concerning an upcoming imminent meeting
2 between Hill & Knowlton and the research directors of
3 the companies?

4 A. That's right. It describes a plan to hold
5 interviews with each of the research directors.

6 Q. So this memorandum was apparently prepared
7 sometime subsequent to the first memorandum.

8 A. That's correct.

9 Q. All right. Let me direct your attention about
10 halfway down that first paragraph to the language
11 that reads, "Boy!"

12 We went just a little bit too far, Ms. Sutton.
13 "Boy! wouldn't it be wonderful if our company
14 was the first to produce a cancer free cigarette.
15 What we could do to competition!"

16 Now what does that say about the incentive to
17 compete that was recognized by the research directors
18 of these companies?

19 A. Well what we see in this quote, which obviously
20 is similar in some ways to quotes we saw later from

21 the various companies, but what this shows is that
22 right from the very beginning, in 1953, at the same
23 time where, as we saw in the previous document,
24 they're recognizing that their competitive practices
25 are part of what's creating the problem that the

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1 industry faces, at the same time the research
2 directors are saying, boy, we'd like to go out and do
3 this, we'd like to go out and be the one that
4 produces a cancer-free cigarette because we could
5 destroy the competition. And so what this basically
6 shows is that the industry in 1953 was really at a
7 crossroads. There was a tremendous opportunity and
8 at the same time a tremendous threat.

9 The individual companies, particularly the
10 research director quoted here, saw a path which was
11 to go after this, to compete in a long-term way
12 through the creative destruction process to try to
13 solve this problem, not necessarily because they were
14 altruistic, but because they perceived that if they
15 solved this problem, they would destroy the
16 competition.

17 At the same time, as we saw in the other
18 document, it was understood that this free-for-all
19 would be very threatening to the industry. And it's
20 clear from this document and the other documents and
21 the subsequent evidence that the path the industry
22 chose was not that free-for-all, the path the
23 industry chose was to suppress this competition so
24 that they could maintain the status quo.

25 Q. So even an extremely strong desire to compete

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1 can under certain circumstances be overcome by a
2 collective incentive to conspire?

3 A. If the stakes are high enough, if the danger
4 that's perceived from that free-for-all is big
5 enough, and if the companies have the opportunity
6 because there aren't very many of them and they can
7 meet and work it out and they have the opportunity to
8 collude, then it can overcome the very strong
9 incentives to compete.

10 Q. Let's move to page three of Exhibit 18904.
11 Second paragraph on that page reads, "To work with
12 these men successfully, it is most important for us
13 to understand a wide range of extraordinary things -
14 so that all of us can reach a rather new outlook
15 together."

16 In economic terms, Professor Jaffe, what is the
17 author proposing there?

18 A. Well I think what the author is saying is that
19 although it may seem extraordinary compared to our
20 past behavior, we need to collude, we need to reach a
21 new outlook and we need to reach it together rather
22 than pursuing our own individual approaches to this
23 situation.

24 Q. Are you able to see any other reasonable
25 interpretation of that language, professor?

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1 A. No, I can't see any other way to read it.
2 Q. Then continuing, the author states, "There is
3 only one problem - confidence, and how to establish
4 it; public assurance, and how to create it - in a
5 perhaps long interim when scientific doubts must
6 remain."

7 What type of a solution is the author proposing
8 there, Professor Jaffee?

9 A. Well clearly they're not proposing the
10 competitive solution where the problem would have
11 been how to make the product safer and how to market
12 that safer product; rather, they're clearly proposing
13 a collective solution that involves the effort
14 instead to maintain the status quo by reassuring the
15 public, maintaining confidence, and hopefully
16 toughing it out.

17 Q. Let's go to the next page. There are a series
18 of problems now that the author sets forth?

19 A. That's correct.

20 Q. With respect to problem one, the very last
21 sentence under problem one reads, "May not our real
22 problem be the establishing of a complete
23 understanding that old patterns of idea competition
24 are not going to be perpetuated in this emergency?"
25 Now what is the author suggesting?

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1 A. Well to me, idea competition is basically
2 creative destruction. What he's saying is that our
3 old pattern of competing with each other by trying to
4 come up with new and better ideas cannot be
5 perpetuated. We -- we can't tolerate that kind of
6 old behavior, the competitive behavior, because we
7 face an emergency. Again, of course, the emergency
8 is not from their point of view that the products are
9 dangerous, but that people are threatening to stop
10 buying them. And they're basically saying that we're
11 going to deal with this emergency by not allowing
12 idea competition to be perpetuated.

13 Q. Would you turn now to Bates page 500 of Exhibit
14 18904. There the author lists some things to do?

15 A. That's correct.

16 Q. And on this to-do list there are various items,
17 the first of which deals with naming the committee;
18 correct?

19 A. Yes.

20 Q. And the name of the committee that was
21 ultimately formed was the Tobacco Industry Research
22 Committee.

23 A. That's correct.

24 Q. Did that closely parallel the suggestion by Mr.
25 Hill, along with the input of the company presidents?

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1 A. Yes, it did.

2 Q. The second suggestion had to do with a basic
3 credo statement. "We place health first; we have
4 long been seeking the facts; we are financing more
5 research, seeking still more facts."

6 How did that particular proposed credo compare
7 to the credo that was set forth by the sponsors of
8 the Frank Statement?

9 A. It's very similar to the language in the Frank
10 Statement where the companies talked about health
11 being a paramount concern, and talked about creating
12 the TIRC, which was going to do research and get at
13 the facts. Very -- it's the basic idea that was
14 conveyed by the Frank Statement.

15 Q. All right. And as you've been answering that
16 question, I've been showing to the jury Exhibit
17 30210, which is a copy of the Frank Statement;
18 correct?

19 A. That's correct.

20 Q. And there's a reference in the Frank Statement
21 in the left column that "We accept an interest in
22 people's health as a basic responsibility, paramount
23 to every other consideration in our business."

24 A. That's correct.

25 Q. And is that similar to the first sentence of the
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1 proposed credo?

2 A. Yes, it is.

3 Q. And in the right-hand column of the Frank
4 Statement, are there various references to conducting
5 research?

6 A. Yes.

7 Q. And in fact, at the bottom of the left-hand
8 column and going into the right-hand column, are
9 there references to cooperation with health
10 authorities, that we'll be seeking answers to the
11 questions of smoking and health?

12 A. That's correct.

13 Q. And does the Frank Statement contain a
14 representation that the Tobacco Industry Research
15 Committee will sponsor research or fund research into
16 all phases of tobacco use and health?

17 A. Yes, it does.

18 Q. So that particular credo was basically adopted
19 by the industry -- or by the sponsors of the Frank
20 Statement?

21 A. That's correct.

22 Q. All right. Item two goes on to state in the
23 second sentence, "Then -- consider exactly what
24 viewpoint and attitude industry will universally
25 adopt toward unfavorable research reports."

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1 Now is that concept consistent with the
2 information that was set forth in the Frank
3 Statement?

4 A. I don't think it's consistent with the Frank
5 Statement as it was published, and it's certainly not
6 consistent with the fact that -- well not consistent

7 with a competitive response to this situation by the
8 individual companies. Because as I described
9 earlier, this situation was, although it was a
10 threat, was also in many ways a competitive
11 opportunity, and what we would expect in a
12 competitive industry is that the firms in the
13 industry would want to address such a competitive
14 opportunity in whatever way they saw as best, as
15 opposed to universally adopting some particular
16 attitude that they're all going to take towards
17 unfavorable research reports.

18 Q. And from an antitrust point of view, what
19 significance do you place on the use of the term
20 "universally" in that sentence?

21 A. I read that to be another statement that they're
22 going to collude with respect to their approach to
23 unfavorable research reports.

24 Q. And would that statement be inconsistent with an
25 expressed willingness in the Frank Statement to

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1 cooperate with public health authorities?

2 A. Yes, I think so.

3 Q. Would that be --

4 Would that statement, to adopt a universal
5 position toward unfavorable research reports, be
6 consistent or inconsistent with a pledge to cooperate
7 with public authorities?

8 A. It would be inconsistent.

9 Q. All right. Directing your attention to the
10 fifth item on the to-do list, that one states,
11 "Decide whether we suggest company publicity or
12 advertising. Consider what the chief points in such
13 messages should be. Decide how this advertising
14 could be coordinated, so that it doesn't bog down a
15 competitive dog fight. Decide what any one company
16 could say, that couldn't be better said by all
17 companies jointly -- when they honestly face a
18 problem of human import where competition has no
19 place."

20 Do you agree with that assessment?

21 A. Well I certainly don't agree with the assessment
22 that competition has no place, unless you define
23 "problem" as the financial threat to the industry as
24 opposed to the problem being that the product has
25 been shown to be potentially harmful. And certainly

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1 from a competitive point of view, basically what
2 they're saying is instead of adopting the approach
3 that the Brown & Williamson guidelines say you
4 should, which is you don't discuss advertising with
5 your competitors, they're saying let's avoid a
6 competitive dog fight, let's make sure that we don't
7 bog down in such a dog fight by coordinating what we
8 say to the public.

9 Q. All right. And lastly, Professor Jaffe, let me
10 direct your attention to item number nine. The first
11 sentence there reads, "Develop some understanding

12 with companies that, on this," and the word "this" is
13 underscored, "problem, none is going to seek a
14 competitive advantage by inferring to its public that
15 its," and "its" is underscored, "product is less
16 risky than others."

17 Now what would be the competitive consequences
18 of such an understanding as was suggested by the
19 author at item number nine?

20 A. Well the consequence of successfully achieving
21 such an understanding would be essentially to shut
22 down the process of creative destruction, because it
23 is precisely the competitive advantage that you could
24 gain by trying to tell the public that your product
25 is -- is less risky, if you really could succeed in

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1 making one that was less risky, that drives the
2 process of creative destruction. So the agreement
3 that's described in number nine there is essentially
4 an agreement to shut down fundamental competition
5 with respect to the smoking-and-health issue in the
6 U.S. cigarette market.

7 Q. Now Professor Jaffe, with respect to both of the
8 Hill Knowlton memoranda, were you able to locate
9 anywhere on either memorandum where the authors
10 indicated that a copy was provided to any
11 representative of the tobacco industry?

12 A. No. They don't indicate that they were copied
13 to people in the companies.

14 Q. In all of your review of the internal documents
15 of the defendants dealing with their competitive
16 behavior, were you able to locate any internal
17 document that contained any reference to the type of
18 discussions that we have seen memorialized in these
19 two documents?

20 A. No, I didn't see any such documents.

21 Q. Assuming that the formation of the Tobacco
22 Industry Research Committee was merely a public
23 relations ploy, would you have expected to find some
24 memorialization of the events that occurred at these
25 meetings somewhere in the files of at least one of

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1 the defendants?

2 MR. BLEAKLEY: I object, Your Honor, that
3 calls for speculation on the part of the witness.

4 THE COURT: Well you may answer that.

5 A. Well I think, given what's said in these
6 documents and what the company said publicly about
7 the significance of these events, I think it would be
8 a reasonable expectation that if what was going on
9 there was innocent, that there would have been some
10 internal documents where the presidents gave
11 instructions to other people in the company about how
12 to carry this out and so forth. So I think it would
13 have been reasonable to expect that you might have
14 seen this.

15 Q. And what inferences do you draw from the absence
16 of any such mention?

17 A. Well it --
18 MR. BLEAKLEY: Same objection, Your Honor,
19 calls for speculation.
20 THE COURT: You may answer.
21 A. I think that the fact that we don't see any
22 documents from the companies describing the kind of
23 decisions that were reached at the meetings is
24 certainly consistent with the fact, as laid out in
25 the Hill & Knowlton document, that the agreements

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1 that were reached were agreements that they didn't
2 want to be -- there to be evidence of.

3 Q. And finally, Professor Jaffe, in your opinion,
4 what is the overall significance of these two Hill
5 Knowlton memoranda in terms of the ability of the
6 process of creative destruction to provide consumer
7 benefits?

8 A. Well I think if we take these two documents
9 together and examine them together, and also in the
10 context of what we know then transpired over the next
11 four decades, what we have is really an amazing
12 description of what would have occurred or what could
13 have occurred if creative destruction had been
14 allowed to operate, why that competition, that
15 long-term competition was to incredibly threatening
16 to the members of the industry and the status quo, as
17 well as essentially a blueprint for an agreement to
18 prevent that from happening by suppressing that
19 competition, by colluding to suppress that
20 competition.

21 Q. Did the defendants create any internal documents
22 that reflect conduct consistent with adoption of the
23 proposals contained in these Hill Knowlton memoranda?

24 A. Yes.

25 Q. Would you look at Exhibit 10598, please.

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1 THE COURT: Counsel, why don't we take a
2 short recess.

3 MR. GILL: Thank you, Your Honor.

4 THE CLERK: Court stands in recess.

5 (Recess taken.)

6 THE CLERK: All rise. Court is again in
7 session.

8 (Jury enters the courtroom.)

9 THE CLERK: Please be seated.

10 THE COURT: Counsel.

11 MR. GILL: Thank you, Your Honor.

12 BY MR. GILL:

13 Q. Professor Jaffe, can I ask you to take another
14 look at Exhibit 18904.

15 A. Yes.

16 Q. To your understanding, Professor Jaffe, were
17 these two Hill Knowlton memoranda produced from the
18 files of any of the defendants in this lawsuit?

19 A. No, that's not where they came from.

20 Q. Where did they come from?

21 A. As I understand it, there's a stamp on that page

22 which indicates that they came from an archives at
23 the University of Wisconsin, apparently from the
24 estate of Mr. Hill.

25 Q. Does the same stamp appear on Exhibit 18905?

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1 A. Yes, it does.

2 Q. All right. Before the break, then, Professor
3 Jaffe, I believe I'd asked you to take a look at
4 Exhibit 10598. Will you do that now, please.

5 A. Yes, I have it.

6 Q. Professor Jaffe, is this a document that you
7 have relied upon in forming your opinions in this
8 case?

9 A. Yes.

10 MR. GILL: Your Honor, we'll offer Exhibit
11 10598.

12 MR. BLEAKLEY: No objection.

13 THE COURT: Court will receive 10598.

14 BY MR. GILL:

15 Q. Professor Jaffe, this exhibit was produced from
16 the files of BATCo Ltd.; is that correct?

17 A. That's correct.

18 Q. And it is a "REPORT ON GROUP SMOKING AND HEALTH
19 CONFERENCE" that occurred in Germany during May of
20 1974; is that correct?

21 A. That's correct.

22 Q. 1974 would place us 20 years out from the time
23 that the Frank Statement was issued.

24 A. That's correct.

25 Q. Now the particular document deals with various
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1 reports that were delivered during this conference
2 that occurred in Germany in 1974.

3 A. Yes, it does.

4 Q. And if you would turn to page two under agenda
5 item two, the report deals with "Reports by Delegate
6 Companies." And you understand that BATCo as of this
7 point in time consisted of a number of different
8 tobacco companies throughout the world?

9 A. That's correct.

10 Q. One of which was Brown & Williamson.

11 A. That's right.

12 Q. And the first area where reports from delegates
13 were received, with respect to this document at
14 least, was the U.S.A.?

15 A. That's correct.

16 Q. And then if you'll turn the page, about
17 two-thirds of the way down on that page there is a
18 paragraph that reads, "On the whole, the U.S.
19 industry was still united, but L&M was developing a
20 technique for reducing biological activity by direct
21 spraying, and B&W was attempting to get agreement
22 from the other companies not to pursue this line."

23 Would that type of conduct on the part of B&W
24 have been in compliance with its own internal
25 antitrust compliance program?

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1 A. No. As we saw in that document, one of the
2 things that they weren't supposed to discuss with
3 other companies were product offerings, and what
4 appears to me -- or what this document says B&W
5 reported to the other BATCo companies was that they
6 were talking to the other U.S. companies attempting
7 to get an agreement not to pursue a particular form
8 of product development.

9 Q. And BATCo, of course, was a participant in this
10 conference, as well as B&W.

11 A. It was -- it was a BATCo conference, that's
12 correct.

13 Q. What is the significance of the statement that
14 "On the whole, the U.S. industry was still
15 united...?"

16 A. Well again, companies in competitive industries
17 aren't supposed to be united. What this suggests is
18 a reference on the part of Brown & Williamson
19 reporting to the other BATCo companies that the
20 collusive agreement for the most part seemed to be in
21 place in the United States.

22 Q. Professor Jaffe, are you able to point to any
23 single incident that manifested the importance of the
24 conspiracy to the participants?

25 A. Yes.

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1 Q. Would you turn to Exhibit 11512. Is this a
2 document that you relied upon, Professor Jaffe?

3 A. Yes.

4 MR. GILL: We'll offer Exhibit 11512, Your
5 Honor.

6 MR. BLEAKLEY: No objection, Your Honor.

7 THE COURT: Court will receive 11512.

8 BY MR. GILL:

9 Q. Professor Jaffe, this is a document that was
10 produced by B.A.T Industries. What's your
11 understanding of the relationship between B.A.T
12 Industries, as of the time of this document, with
13 BATCo?

14 A. Well as of 1983, B.A.T Industries was, I
15 believe, a parent company of BATCo.

16 Q. And this document of course, as indicated, is on
17 the letterhead of B.A.T Industries?

18 A. That's correct.

19 Q. The date is 9 September, 1983.

20 A. Yes.

21 Q. It is from the chairman's office.

22 A. That's correct.

23 Q. And who -- who signed this document on behalf of
24 B.A.T Industries?

25 A. It's signed on page two by Mr. Sheehy, the

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1 chairman of B.A.T Industries.

2 Q. Going back to the first page, there's an

3 indication in the upper right-hand corner that
4 various individuals received copies of this letter.
5 A. That's correct.
6 Q. One of those is Mr. E. A. A. Bruell. Is it your
7 understanding that Mr. Bruell held an executive
8 position with BATCo at this time?
9 A. That's my understanding.
10 Q. And what was his position?
11 A. I believe he was the president of BATCo at that
12 time.
13 Q. So the chairman of B.A.T Industries is sending a
14 letter, and he's copying it to the president of
15 BATCo.
16 A. Among others, yes.
17 Q. Now the letter is addressed to Mr. George
18 Weissman at Philip Morris Incorporated on Park Avenue
19 in New York; correct?
20 A. Correct.
21 Q. Who was George Weissman at that time?
22 A. George Weissman was the chairman of Philip
23 Morris Inc.
24 Q. So we have a letter coming from the chairman of
25 B.A.T Industries to the chairman of Philip Morris

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1 Incorporated.
2 A. That's correct.
3 Q. Now in the first paragraph Mr. Sheehy states,
4 "Philip Morris Holland B.V. recently took out
5 full-page newspaper ads in violation of Dutch law to
6 republish an anti-smoking group's slander of
7 Barclay."
8 Have you reviewed documents that deal with this
9 particular incident?
10 A. Yes, I have.
11 Q. Does Mr. Sheehy go on to state specifically what
12 he found objectionable about this incident?
13 A. Yes, he does.
14 Q. And where does he do that?
15 A. Well in the third paragraph of the letter, Mr.
16 Sheehy says to Mr. Weissman, "I find it
17 incomprehensible that Philip Morris would weigh so
18 heavily the short-term commercial advantage from
19 deprecating a competitor's brand while weighing so
20 lightly the long-term adverse impact from an on-going
21 anti- -- excuse me, "from an on-going anti-smoking
22 program. I believe this is the first time a Tobacco
23 Manufacturer has purchased space to promulgate the
24 anti-smoking position. In doing so, Philip Morris
25 not only makes a mockery of Industry co-operation on

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1 smoking and health issues, but also appears to
2 inaugurate a free-for-all in which illegal conduct is
3 condoned provided the commercial stakes are high
4 enough."
5 Q. Now this letter would have been written 30 years
6 from the time of the meeting at the Plaza Hotel of
7 the domestic cigarette companies, including Brown &

8 Williamson.
9 A. Approximately, that's right.
10 Q. What is the significance of what Mr. Sheehy is
11 saying to Mr. Weissman in that paragraph?
12 MR. CORRIGAN: Your Honor, Your Honor,
13 excuse me, if I might interpose an objection. As the
14 document itself specifically makes clear, this has
15 nothing to do with the United States. The witness
16 has already testified the relevant market is the U.S.
17 market. Since objections by Mr. Ciresi to matters
18 having to do with outside of the United States were
19 sustained, mine should be as well.

20 THE COURT: The objection is overruled.
21 You may answer.
22 A. What the significance of the document is that --
23 I'm sorry, I forget what the question was.
24 Q. What is the significance of the statement by Mr.
25 Sheehy to Mr. Weissman in the third paragraph of the

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1 first page of this letter?
2 A. Okay. I thought that's what it was, but I
3 wanted to make sure.
4 What he's saying is that Philip Morris is making
5 a mockery of industry cooperation, suggesting that
6 industry cooperation was, prior to this, an important
7 and continuous property of the industry, and in
8 particular he's making a mockery of industry
9 cooperation on smoking-and-health issues.

10 And clearly, this is a matter of tremendous
11 significance and importance to B.A.T Industries. We
12 have a letter from the chairman of the parent
13 company, B.A.T Industries, to the chairman of Philip
14 Morris regarding an incident in Holland that involved
15 subsidiaries of each company in Holland.

16 Q. Does Mr. Sheehy go on to state in the letter
17 what he expects Mr. Weissman to do about it?

18 A. Yes, he does.

19 Q. Can you direct our attention there, please.

20 A. At the bottom of that first page, the last
21 paragraph there, he says, "I am confident that you do
22 not approve of the questionable tactics behind your
23 Dutch company's advertisement of the 2nd September in
24 the newspapers 'De Telegraaf' and 'Algemeen Dagblad'
25 and will ensure that not only are they not repeated,

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1 but that your Dutch Affiliate will unreservedly
2 retract the advertisements."
3 Q. Now was there additional correspondence between
4 BATCo and Philip Morris with respect to this matter?
5 A. Correspondence between BATCo and Philip Morris?
6 Q. Were there additional communications of any
7 kind?
8 A. Yes, there were additional communications.
9 Q. And was there additional correspondence from
10 BATCo directly dealing with the subject matter of Mr.
11 Sheehy's letter?
12 A. Yes, there was.

13 Q. All right. Would you turn to Exhibit 10933,
14 please. This exhibit, I believe, is already in
15 evidence, Professor Jaffe.

16 This is a letter on the stationery of
17 British-American Tobacco Company Ltd.; correct?

18 A. That's correct.

19 Q. And the letter is written by Mr. E. E. A.
20 Bruell; is that correct?

21 A. That's correct.

22 Q. And who is the letter addressed to?

23 A. The letter is addressed to No. 1s -- excuse me,
24 to all No. 1s of operating companies of BATCo.

25 Q. And we have Mr. Bruell's initials right above
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1 that; do we not?

2 A. That's correct.

3 Q. And we also have his signature on the fourth
4 page of the letter; do we not?

5 A. That's right.

6 Q. And one of the No. 1s would have been the number
7 one at Brown & Williamson; true?

8 A. At that time, that's correct.

9 Q. Now this letter deals with relations with
10 INFOTAB, national manufacturers associations, and
11 competitors; correct?

12 A. Yes.

13 Q. Mr. Bruell states to the No. 1s that "On 2nd
14 September in Holland, the Philip Morris company in
15 that country published an advertisement - Appendix A
16 attached. The advertisement had two inch headlines
17 saying, quote, A message about which smokers must not
18 think too lightly, unquote. There followed an
19 extract from an article the previous day in the same
20 newspaper." And then he goes on to say that the
21 translation of the article is also being sent along.

22 Now what is significant about this particular
23 communication from Mr. Bruell to the No. 1s of the
24 various BATCo companies?

25 MR. CORRIGAN: Objection, Your Honor, same
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1 grounds as I elucidated earlier.

2 THE COURT: You may answer that.

3 A. Well this is a memorandum going out from Mr.
4 Bruell to the heads of all of the BATCo operating
5 companies. If you look later in the document you can
6 see this includes, you know, Malta, Cyprus, South
7 Africa, Zambia, countries all over the world,
8 describing this incident in Holland. And as it shows
9 right in the next section of the memo after the
10 portion you read, what he's indicating has so upset
11 BATCo and B.A.T Industries about this incident is
12 that what Philip Morris has done is, number one,
13 raise the health issue to gain competitive advantage,
14 and then number two, quoted and thereby endorsed a
15 report of an anti-smoking lobby, in this instance the
16 Dutch Association of Public Health and Smoking, to
17 attack another company in the industry.

18 So what this shows is that from the perspective
19 of the head of BATCo in 1983, raising the health
20 issue to gain competitive advantage is a matter of
21 tremendous concern and significance to the company
22 and something that clearly they would have expected
23 would not have occurred, and they are quite upset
24 that it has occurred.

25 Q. Now how would the language "raise the health
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1 issue to gain competitive advantage" relate to what
2 was discussed in the Hill Knowlton memos 30 years
3 before?

4 A. Well I think what we're -- what we're seeing
5 here is a potential outbreak of precisely the kind of
6 competitive dog fight that the Hill & Knowlton
7 documents feared, as companies in the industry, as a
8 result of their desires to gain competitive advantage
9 over other companies by raising the health issue,
10 would exacerbate consumers' health concerns. And so
11 this is exactly the kind of competitive practice that
12 the Hill & Knowlton documents indicate the companies
13 in the industry had agreed they were going to do
14 something about.

15 Q. And what does this document tell you about the
16 reaction of the industry to the proposals by Hill &
17 Knowlton in 1953 on the subject of competitive
18 behavior?

19 A. Well this document, together with the other
20 documents that we're going to see around this
21 incident, shows that Hill & Knowlton's recommendation
22 to agree to suppress this behavior was still being
23 carried out some 30 years later.

24 Q. Now the first page also, just below the two
25 items that you referenced, contains a reference to

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1 lawyers in Holland immediately advising the Philip
2 Morris company that they were breaking Dutch law.

3 A. That's correct.

4 Q. Do you consider the violation of Dutch law in
5 connection with this incident as an alternative
6 explanation for correspondence of the type that we've
7 just been reviewing?

8 MR. BLEAKLEY: Objection, Your Honor, that
9 calls for speculation.

10 THE COURT: You may answer that.

11 A. In my opinion, it doesn't make sense to
12 interpret this correspondence to mean that what BATCo
13 and B.A.T Industries was upset about was the fact
14 that Dutch law had been violated. First of all, this
15 document very clearly says the number one concern,
16 right at the top, was that the health issue was
17 raised to competitive advantage, and it's only later
18 that the issue of violating Dutch law is raised. And
19 further, it doesn't make economic sense that the head
20 of BATCo would be writing to the head of operating
21 companies all over the world, in Africa, in Asia and
22 the Far East, instructing them regarding how to

23 relate to INFOTAB and other competitors as the result
24 of an action of a Dutch subsidiary of Philip Morris
25 in Holland if the only concern was a violation of
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1 Dutch law regarding competitive advertising.

2 Q. Would a violation of Dutch law explain why Mr.
3 Sheehy, as chairman of B.A.T Industries, was
4 corresponding with the chairman of Philip Morris?

5 A. I don't think so.

6 Q. Were you able to review an interpretation of
7 what this ad actually said?

8 A. Yes.

9 Q. Would you look at Exhibit 10934.

10 A. Yes, I have it.

11 Q. Is this a document that you've relied upon in
12 forming your opinions?

13 A. Yes, it is.

14 MR. GILL: We'll offer Exhibit 10934, Your
15 Honor.

16 MR. CORRIGAN: Your Honor, same objection.
17 This is a foreign advertisement. The witness has
18 made it very plain that he did not analyze any of
19 this, that it's not relevant to his opinion. During
20 the testimony of Mr. Dolan, Mr. Ciresi objected to
21 testimony about foreign advertisements; I'm entitled
22 to equal treatment.

23 THE COURT: The objection is overruled.
24 You may answer.

25 Q. Did you rely upon this document?

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1 A. Yes, I did rely on this document.

2 Q. All right. Would you --

3 Would you then refer to the title of this
4 particular document. And actually, just above the
5 title it shows that it was an appendix -- an appendix
6 to some other document, Appendix A in the upper
7 right-hand corner.

8 A. Yes. It indicates it's Appendix A, which was
9 mentioned in the previous document as being attached,
10 and it was a copy of the ad.

11 Q. So this purports to be the English translation
12 of the Dutch ad; is that your understanding?

13 A. Yes, that's -- that's what you would conclude
14 based on this document and the previous one.

15 Q. And it appears to be the translation that Mr.
16 Bruell provided to the No. 1s of all the operating
17 companies.

18 A. That's correct.

19 Q. And it indicates that -- right at the top, that
20 it's the translation of a full-page ad inserted on
21 2nd September, 1983 in national morning papers in
22 Holland; correct?

23 A. Correct.

24 Q. All right. The heading for the ad was
25 apparently "A message about which smokers must not

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1 think too lightly?"

2 A. Correct.

3 Q. And then it goes on to state in the next
4 section, "The amount of smokers in this year has
5 increased by 3 percent." And then in the next
6 section it states, under "RESEARCH," "The above data
7 have been derived from a research, instituted by the
8 'Association of People's Health and Smoking', done on
9 a once a year basis."

10 A. Right.

11 Q. So the ad reports that the level of smoking is
12 on the rise.

13 A. That's correct.

14 Q. Then it goes on to state, "The Association
15 assumes that the new, so-called, quote, healthy,
16 unquote, cigarette Barclay has been the evildoer.
17 People think that there exists no health danger any
18 more now, but research in America has proved that
19 smokers, who slightly compress the Barclay filter
20 between their lips, will take in six times as much
21 nicotine and tar as stated on the packing."

22 Did I read that correctly?

23 A. Yes.

24 Q. Now what's your interpretation of the type of
25 competitive claim that's being made here by Philip

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1 Morris in connection with Barclay?

2 A. Well Barclay is a -- is a BATCo product, and
3 Philip Morris is running an advertisement. We can
4 see in the very next section it says, "This is an
5 advertisement of Philip Morris Holland B.V., the
6 manufacturers of real low tar and nicotine
7 cigarettes," and then it mentions two Philip Morris
8 brands.

9 So what Philip Morris is doing here is running
10 an ad which says, you know, our products are the real
11 low tar and nicotine cigarettes and the Barclay is
12 not. And so it's an example of an attempt to
13 competitively exploit the health issue.

14 MR. BERNICK: Your Honor, I have a motion
15 to make at side-bar, if the court will hear it
16 briefly.

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1 (Side-bar discussion as follows:)

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1 THE COURT: In case the record's not clear,
 2 10934 has been admitted.

3 MR. GILL: Thank you, Your Honor.

4 BY MR. CIRESI:

5 Q. Professor Jaffe, I believe the question that I
 6 was posing to you at the time of the side-bar had to
 7 do with the nature of this ad. Did you reference
 8 this ad as an example of competitive advertising?

9 A. No, I don't think I said --

10 Q. I'm sorry, comparative advertising.

11 A. I don't know whether I said one way or another
 12 whether it was comparative advertising. I think what
 13 I said was what it shows is an attempt by Philip
 14 Morris to compete in Holland and to do so in a way
 15 that raises the health issue and relies upon
 16 consumers' health fears, and that the reaction that
 17 that produced from BATCo and B.A.T Industries, and as
 18 we'll see in a minute also Brown & Williamson,
 19 confirms that that was not something they expected
 20 Philip Morris to participate in, and that they were
 21 very upset that Philip Morris had done so.

22 Q. All right. And if I can direct your attention
 23 to the very bottom of this exhibit under the "Pay-off
 24 Line" where it reads, "the manufacturers of real low
 25 tar and nicotine cigarettes," with respect to a

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1 reference to Philip Morris's product, now is there an
 2 attempt in this ad run by Philip Morris's subsidiary
 3 in Holland to compare its low tar/low nicotine
 4 cigarettes to Barclay with respect to the health
 5 issue?

6 A. Well yes. I think what it's suggesting,
 7 clearly, are the Philip Morris products are the,
 8 quote, real low tar and nicotine cigarettes, and that
 9 Barclay is not.

10 Q. Now would this type of advertising on the part
 11 of Philip Morris's subsidiary be pro-competitive?

12 Anti-competitive? How would you describe it?

13 A. Well I would say that the -- the ad itself is an
 14 act of competition. It's pro-competitive.

15 Q. And so this particular pro-competitive ad drew
 16 this type of reaction that we've been discussing.

17 A. That's correct.

18 Q. Now did you find additional evidence of further
 19 contact between executives of Philip Morris and BATCo
 20 with regard to this incident?

21 A. Yes.

22 Q. Would you turn, then, to Exhibit 11934. This is
 23 already admitted into evidence, I believe, Professor
 24 Jaffe.

25 A. Okay. I have it.

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1 Q. All right. We'll just let Ms. Sutton catch up
 2 with us.

3 A. Okay.

4 Q. Can you identify Exhibit 10,000 -- or excuse me,

5 11934, in terms of what it purports to be.
6 A. Yes. It's labeled "TELEPHONE CONVERSATION
7 BETWEEN H. CULLMAN AND E.A.A.B. - 26TH OCTOBER 1983."
8 And it's a document from BATCo.
9 Q. All right. And H. Cullman would be Hugh
10 Cullman?
11 A. That's correct.
12 Q. And do you have an understanding of what his
13 position was with Philip Morris in October of 1983?
14 A. I believe that at this time Hugh Cullman was the
15 president of Philip Morris International.
16 Q. Mr. Bruell, as we've previously seen, was the
17 president of BATCo.
18 A. That's correct.
19 Q. Now this is a document that was produced by
20 BATCo Ltd. in this case; correct?
21 A. Yes.
22 Q. So obviously it came from B.A.T. Company's
23 files.
24 A. Yes.
25 Q. All right. Now what is occurring here in this
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1 document?
2 A. Well essentially what's occurring here in this
3 document is that Hugh Cullman, the president of
4 Philip Morris International, is -- this is now
5 subsequent to the letter that we saw that went from
6 the chairman of B.A.T Industries to the chairman of
7 Philip Morris Incorporated, which is the parent
8 company above Philip Morris International that Hugh
9 Cullman is the head of, and this is about a month
10 later, and what's going on in this phone
11 conversation, according to Mr. Bruell's notes of the
12 phone conversation, is that Mr. Cullman on behalf of
13 Philip Morris essentially is recognizing that this ad
14 was a breach of the industry agreement and that he's
15 going to make sure that it doesn't happen again.
16 Q. Under the reference to H.C. at the top of the
17 page where it reads, "Essential Industry hang
18 together," what is your interpretation of that
19 statement?
20 A. Well I think when they're saying hang together,
21 that's in a sense of, I guess, the signers of the
22 Declaration of Independence, that they were all going
23 to hang together rather than hang separately, that
24 the industry is going to cooperate on this matter
25 rather than acting competitively.

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1 Q. Then Mr. Cullman apparently indicated that
2 Holland activity was not Philip Morris company
3 policy. See that?
4 A. That's correct.
5 Q. And he indicates that they must try to prevent
6 this happening in the future. Now what do you make
7 of that -- that statement on the part of Mr. Cullman,
8 that it wasn't Philip Morris company policy and that
9 it's necessary to try to prevent this occurring in

10 the future?
11 A. Well particularly since these are Mr. Bruell's
12 notes, I think that "they" refers to Philip Morris,
13 and what it's saying is that Philip Morris is going
14 to make sure that this doesn't happen again, that
15 they're going to in effect get back in line with
16 regard to suppressing competition related to smoking
17 and health.

18 Q. How does Mr. Bruell respond?
19 A. Well Mr. Bruell reiterates that they're
20 concerned that this should never happen again, and
21 that Philip Morris's message should go out to all
22 parts of the world, and then describes how that
23 should happen.

24 Q. Then does Mr. Cullman indicate his understanding
25 that there were two issues that still need to be

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1 addressed?

2 A. That's correct.

3 Q. And what does he say on that subject?

4 A. He says first that all Philip Morris companies
5 are to be told, and that that statement is to be
6 reinforced by other member companies of INFOTAB,
7 which is an international organization that these
8 companies belong to.

9 Q. Then does Mr. Cullman further in this exchange
10 repeat for the sake of clarity what is requested?

11 A. Yes, he does. He's quoted by Mr. Bruell as
12 repeating and saying Philip Morris to instruct its
13 No. 1s, they must not use anti-smoking activities,
14 statements or programs for competitive gain.

15 Q. And then Mr. Cullman wants to know what happens
16 if this rule is broken?

17 A. That's what it indicates.

18 Q. How does Mr. Bruell respond?

19 A. Mr. Bruell responds that he would expect that
20 Philip Morris would take drastic action with the
21 offender.

22 Q. And then continuing on to the second page of
23 this exhibit, how did this call conclude, according
24 to the author of these notes?

25 A. According to the note, Mr. Cullman concluded the
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1 call by saying that he did not know what disciplinary
2 action was taken at this time. He now sees the
3 ramifications of the issue as a whole.

4 Q. What's your interpretation of the significance
5 of the fact that Mr. Cullman now sees the
6 ramifications of this incident?

7 MR. BLEAKLEY: Objection, calls for
8 speculation.

9 THE COURT: You may answer that.

10 A. Well I think the significance is that he's
11 summing it up by saying he sees the ramifications of
12 the issue as a whole, he sees the connection between
13 this issue and the broader concerns that the industry
14 face and the agreement that they have to deal with

15 those concerns.
16 Q. All right. Based upon your review of the
17 internal documents of the industry, is this the end
18 of this incident?

19 A. No, it's not.
20 Q. All right. Let's go to Exhibit 13408.
21 A. I have it.
22 Q. Is this another document upon which you've
23 relied in forming your opinions, Professor Jaffe?
24 A. Yes.

25 MR. GILL: We'll offer Exhibit 13408, Your
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1 Honor.
2 MR. BLEAKLEY: No objection.
3 THE COURT: Court will receive 13408.
4 BY MR. GILL:
5 Q. Now this document is a little bit hard to read,
6 but it does show that it was produced from the files
7 of Brown & Williamson. Is that correct?
8 A. That is correct.
9 Q. All right. And I'd like you to assume that in
10 producing this from the files of Brown & Williamson,
11 the source was the files of I. W. Hughes, who was the
12 CEO of Brown & Williamson in 1983. Can you assume
13 that?
14 A. Okay.
15 Q. Now what does this document appear to be?
16 A. This document appears to be a speech that was
17 drafted for presentation by someone who was an
18 employee of Brown & Williamson dealing with the
19 incident in Holland that we've just seen discussed in
20 correspondence between B.A.T Industries, BATCo and
21 Philip Morris.
22 Q. So somebody from Brown & Williamson was going to
23 give a presentation, and it was going to focus on
24 this incident.
25 A. That's correct.

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1 Q. All right. The first paragraph reads,
2 "Recently, a Dutch subsidiary of Philip Morris chose
3 to adopt a position concerning the smoking and health
4 controversy that aligned that company with a
5 government backed anti-smoking organization. I
6 understand that Philip Morris Corporate has since
7 indicated that the action of the Dutch subsidiary
8 does not reflect the corporate office view and that
9 the subsidiary acted wrongly in an excess of
10 competitive zeal."

11 First of all, is that statement with respect to
12 the response of Philip Morris consistent with the
13 content of the exhibit that we just discussed?
14 A. Yes, that -- that would seem like a reasonable
15 summary of the position that Mr. Cullman took in the
16 phone conversation that we just looked at that he had
17 with Mr. Bruell.
18 Q. And would I. W. Hughes, as the president and CEO
19 of Brown & Williamson in 1983, have been a number

20 one?
21 A. Yes, he was the number one of Brown &
22 Williamson, which was one of the BATCo companies.
23 Q. So he would have assumedly received Mr. Bruell's
24 letter reporting on this incident.
25 A. That's what you would expect based on the fact

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1 that it was sent to all the No. 1s.
2 Q. And then subsequent to that letter being sent to
3 the No. 1s, we saw that Mr. Bruell had a telephone
4 conversation with Mr. Cullman in which Mr. Cullman
5 essentially apologized for the incident.
6 A. Apologized and said that he would make sure it
7 would not happen again.
8 Q. Now the presenter with respect to this
9 presentation referred to Philip Morris's actions as
10 having been motivated by an excess of competitive
11 zeal.
12 A. Yes.

13 Q. Do you agree?
14 A. No. I mean to me an excess of competitive zeal
15 would be -- I'm not sure what it would be, something
16 like blowing up your competitor's facility or
17 something. But certainly, running an advertisement
18 that presents certain information about a
19 competitor's product is not an excess of competitive
20 zeal.

21 Q. Well based upon your experience and training,
22 Professor Jaffe, where on the chart of competitive
23 activity would that ad in the Holland newspapers have
24 ranked?

25 A. I would say that that was fairly mild
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1 competition, compared to some of the things that
2 firms that are actively competing with each other do.
3 Q. Directing your attention to the last paragraph
4 of the first page of Exhibit 13408, that reads,
5 "Having said that, I don't think that the matter
6 should rest there. Brown & Williamson's real concern
7 is that a precedent has been established and that
8 something similar to what happened in Holland could
9 easily be repeated."

10 Now to your understanding, where was Brown &
11 Williamson selling cigarettes?

12 A. In the United States.

13 Q. And the reference to the possibility of this
14 incident being repeated would have what implications
15 for the U.S. cigarette market?

16 A. Well when he says "Brown & Williamson's real
17 concern," to the extent that it's a concern of Brown
18 & Williamson, it would have to be a concern regarding
19 the U.S. cigarette market since that's where Brown &
20 Williamson sells, and so if they say the real concern
21 is that something similar to what happened in Holland
22 could easily be repeated, the only reasonable
23 interpretation is that Brown & Williamson was
24 concerned that it could occur in the United States.

25 Q. Does the speaker, with regard to this
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1 presentation, go on in the document to indicate what
2 type of a response Brown & Williamson might have to
3 the repetition of such an incident?

4 A. Yes.

5 Q. Is that at the start of page -- at the top of
6 page two?

7 A. That's correct.

8 Q. All right. Would you indicate the language that
9 you have in mind.

10 A. The top of the page there it says, "Obviously,
11 this would increase the jeopardy to the credibility
12 and security of the industry. Certainly, if it is
13 convenient to publicly embrace an anti-smoking
14 position in the midst of competitive warfare, how
15 long would it take before public retaliation became
16 an operational necessity?"

17 Q. Now most of us have learned as we grow up that
18 retaliation is not a good thing; true?

19 A. I guess that's right.

20 Q. How about with respect to competition, is
21 retaliation anti-competitive?

22 A. No, I think in the context that's being
23 discussed here, retaliation would mean competitive
24 response or response in kind, responding with
25 competition to a competitive action by the other

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1 firm. I mean I -- I read this paragraph to say that
2 what this person from Brown & Williamson is saying is
3 that this is the competitive dog fight that we saw
4 described in the Hill & Knowlton documents as the
5 thing that they wanted to avoid, and what he's saying
6 is we've avoided it for 30 years, but if it's -- it's
7 going to happen once, it could happen again. If it
8 does, we would feel compelled to respond in kind, and
9 then we would be in the competitive dog fight. And
10 the clear implication is that nobody in the industry
11 would want that.

12 Q. Does this presentation by a Brown & Williamson
13 executive reflect anyplace in it any concern about a
14 violation of Dutch law?

15 A. No, it doesn't mention Dutch law.

16 Q. To your understanding, Professor Jaffe, is this
17 incident with regard to an ad in a newspaper in
18 Holland something that is restricted or limited to
19 that particular venue?

20 A. No, it's clear from the document, including the
21 Brown & Williamson document, that the reaction to
22 this ad and the -- the reinstatement of agreement
23 that occurred after the ad was -- was run was clearly
24 intended to preserve a situation in the U.S. market
25 where this kind of competition relating to smoking

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1 and health would not be tolerated by the -- the
2 defendant companies.
3 Q. Now what does this incident, as -- as described
4 in the last number of documents or exhibits that we
5 have been discussing, what does this incident tell
6 you with respect to the participation of B.A.T
7 Industries and BATCo in the conspiracy that you've
8 identified?
9 A. Well we've seen that they were involved in the
10 communication to Philip Morris -- to George Weissman
11 at Philip Morris in New York via B.A.T Industries
12 that BATCo took an active role by its communication
13 to its member companies, including Brown &
14 Williamson, in essentially enforcing the agreements
15 that was intended to suppress competition.

16 Q. Professor Jaffe, in your opinion does this
17 incident bear any connection to the events that
18 occurred at the Plaza Hotel in December of 1953 as
19 set forth and described in the Hill Knowlton
20 memoranda?

21 MR. CORRIGAN: Your Honor, I object.
22 There's utterly no foundation for that question.

23 THE COURT: You may answer that.

24 A. Yes, I think when you look at the nature of the
25 activity that was involved and the response that it

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1 brought forth, the language that's used by the
2 participants about industry cooperation, about that
3 cooperation being continuous and about this kind of
4 action being unprecedented, it's my opinion that what
5 we're seeing here is the playing out of essentially
6 an enforcement of a component of the agreement that
7 grew out of the meetings at the Plaza Hotel.

8 Q. And playing out at what level of management with
9 respect to B.A.T Industries, BATCo, Brown &
10 Williamson and Philip Morris?

11 A. It played out at absolutely the highest levels
12 of management, the chairman of B.A.T Industries, the
13 president of BATCo, and the chairman of Philip
14 Morris, and the president of Philip Morris
15 International.

16 Q. Are you ready now, Professor Jaffe, to discuss
17 the specific components of this conspiracy to
18 suppress fundamental competition on the
19 smoking-and-health issues?

20 A. Yes, I am.

21 Q. All right. The first component that you
22 identified was no in-house animal research relating
23 to smoking and health; is that correct?

24 A. That's correct.

25 Q. All right. Would you turn, then, to Exhibit

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1 12512.

2 First of all, let me ask you, Professor Jaffe,
3 is this a document you've relied upon in support of
4 your opinions with respect to animal research?

5 A. Yes.

6 MR. GILL: We'd offer Exhibit 12512, Your
7 Honor.

8 MR. BLEAKLEY: No objection.
9 THE COURT: Court will receive 12,000 --
10 Sorry. Give me that again, counsel.

11 MR. GILL: 12512, Your Honor.
12 THE COURT: 12512.

13 BY MR. GILL:

14 Q. All right. This is a document that bears the
15 label "PHILIP MORRIS U.S.A.;" does it not?

16 A. That's correct.

17 Q. But it wasn't produced by Philip Morris U.S.A.;
18 was it?

19 A. No. This is a document, an R. J. Reynolds
20 document, in which the employees at R. J. Reynolds
21 are analyzing Philip Morris.

22 Q. And is that showed on -- shown on the left
23 margin of the face page just beyond the reference to
24 "in HUMPHREY" that you see on the screen?

25 A. Yes, it says "produced by RJRTC in HUMPHREY."

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1 Q. And the author of this document is an H. H.
2 Cudd, Jr. The date is February 17, 1978.

3 A. That's correct.

4 Q. All right. If you turn to the second page, now
5 it indicates under the heading "INTRODUCTION" that
6 "This report presents a summary of data available on
7 Philip Morris U.S.A. and pertinent information on its
8 parent company, Philip Morris Incorporated. It is
9 structured to present both data and interpretation on
10 each major functional area of the company. The
11 conclusions include the best judgment of Philip
12 Morris strategies and the weaknesses upon which it
13 can be attacked in the marketplace."

14 So this is an espionage type of document in
15 terms of competition?

16 MR. BLEAKLEY: Objection, Your Honor.
17 Object to the characterization, and Mr. Gill's
18 testifying.

19 MR. GILL: I'll withdraw that.

20 THE COURT: Rephrase it, counsel.

21 Q. What type of document is this?

22 A. I guess I would characterize this as an
23 industrial intelligence. So R. J. Reynolds is -- is
24 collecting information on its competitor, Mr. Cudd is
25 reporting that information to other people at

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1 Reynolds.

2 Q. And does Mr. Cudd then go on in the second
3 paragraph to indicate the sources for the best
4 judgments that will be set forth in the memorandum?

5 A. Yes, he does.

6 Q. What does he indicate on that subject?

7 A. Well he says he's going to look at published
8 data, he's had discussions with knowledgeable RJR
9 personnel, he's had confidential interviews with
10 individuals in the general business, marketing and

11 financial communities, and he's also talked to past
12 Philip Morris executives, and that he thinks that the
13 opinions that -- that are expressed in here appear to
14 be supported by facts, and the impressions of
15 individuals were solicited from very knowledgeable
16 sources.

17 (Juror coughing.)

18 MR. GILL: Your Honor, perhaps we should
19 take a short recess.

20 THE COURT: Are you okay?

21 (Juror nods affirmatively.)

22 THE COURT: She says she is fine. That's
23 all right. That's okay.

24 BY MR. GILL:

25 Q. All right. Professor Jaffe, in other words, how
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1 do you interpret the author's conclusions regarding
2 the reliability of the data that's going to be set
3 forth in this memo?

4 A. I think the authors are saying that this has
5 been a very thoroughly researched report, and it's
6 the best information that's available to -- to him at
7 RJR at this time regarding Philip Morris.

8 Q. All right. If you would turn to page eight of
9 this report, Bates stamps 077. At this point in the
10 report the author is discussing research and
11 development at Philip Morris; is that correct?

12 A. That's correct.

13 Q. What does the author say of significance to your
14 opinions with respect to his discussion of Philip
15 Morris research and development?

16 I'll direct your attention to the bottom of the
17 page.

18 A. Yes. Towards the bottom of the page where it
19 starts talking about Philip Morris R&D, it says, "R&D
20 for international operations is totally separate from
21 domestic efforts and engages in activities apparently
22 not found in domestic research." And it goes on to
23 say, "A wholly owned subsidiary in Cologne, Germany
24 engages in carcinogenic biological research, such as
25 mouse painting, in violation of the verbal agreement

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1 among domestic companies not to perform animal
2 testing in-house."

3 Q. Based upon your review of the internal documents
4 of defendants, are you aware of any wholly-owned
5 subsidiary of Philip Morris in Cologne, Germany?

6 A. Yes. There was a research firm called INBIFO in
7 Cologne that was owned by Philip Morris at this time.

8 Q. Is it your understanding that INBIFO engaged in
9 carcinogenic biological research?

10 A. Yes, I believe that's true.

11 Q. Now what is the significance of the author's
12 reference to a violation of the verbal agreement
13 among domestic companies not to perform animal
14 testing in-house?

15 A. Well this indicates that Mr. Cudd, based on his

16 research in 1978, believed, as I've indicated on my
17 exhibit there, that there was in fact an agreement
18 among the domestic companies not to engage in animal
19 testing in-house.

20 Q. Now you've been discussing an agreement not to
21 engage in animal testing in-house. Would the
22 conducting of biological research in Cologne, Germany
23 by INBIFO qualify as in-house research?

24 A. Well I suspect that because this was not a sort
25 of written agreement, that they probably had never

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1 worked out the issue of whether it covered in-house
2 research in wholly-owned subsidiaries overseas, and
3 so it probably would have been ambiguous as to
4 whether Philip Morris engaging in that kind of
5 research in a wholly-owned subsidiary in Germany
6 would or would not violate the agreement. What's
7 clear is that Philip Morris -- or this --

8 Based on this, Philip Morris was not engaging in
9 that kind of research in-house within the United
10 States, but it had chosen instead to go overseas to
11 do it.

12 Q. So it's your conclusion that Philip Morris
13 regarded research in Cologne, Germany as being
14 outside the conspiracy?

15 A. Yes, I think so.

16 Q. Okay. Is there any indication that you've seen
17 that RJR made a formal complaint to Philip Morris
18 based upon the information disclosed in this memo
19 regarding some research being conducted in Cologne,
20 Germany of a biological nature?

21 A. No, I haven't seen any evidence of that.

22 Q. All right. Are there additional documents that
23 deal with the subject of animal research?

24 A. Yes.

25 Q. Would you look at Exhibit 2544.

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1 A. I have it.

2 Q. Now is this a document that you've relied upon?

3 A. Yes, it is.

4 Q. And it's already been admitted into evidence.

5 All right. Can you, first of all, tell us which
6 company produced this document?

7 A. This is a Philip Morris document.

8 Q. And in the very upper left-hand corner of this
9 document, above the title, is there a stamp on there
10 that says "DRAFT?"

11 A. Yes, that's correct.

12 Q. And do you know who was the author of this
13 document?

14 A. Yes, this document was authored by Helmut
15 Wakeham, the director of research at Philip Morris.

16 Q. What's your basis for saying that?

17 A. He discussed it in his deposition, said that he
18 authored it.

19 Q. And the title, the working title of the draft
20 document was "NEED FOR BIOLOGICAL RESEARCH BY PHILIP

21 MORRIS RESEARCH AND DEVELOPMENT. "
22 A. That's correct.
23 Q. And from other documents, are you able to place
24 a timeframe with respect to the creation of this
25 draft?

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1 A. Yes. This draft was written sometime in 1968.
2 Q. All right. If you would go to the page that
3 ends in Bates stamp 058, directing your attention to
4 the bottom of the page, it reads, "We have reason to
5 believe that in spite of gentlemans agreement from
6 the tobacco industry in previous years that at least
7 some of the major companies have been increasing
8 biological studies within their own facilities."

9 What is the significance with respect to your
10 opinions, Professor Jaffe, of what Mr. Wakeham has
11 written in this paragraph of the draft?

12 A. Well again, this is another document, now from
13 Philip Morris rather than RJR, in which someone --
14 the head of research at Philip Morris is saying that
15 there was a gentlemen's agreement within the tobacco
16 industry that it was -- that they were not going to
17 engage in biological studies. We know from the
18 discussion of this document and Dr. Wakeham's
19 deposition that the particular concern that that
20 related to was the use of animals for testing
21 in-house.

22 Q. And this document would have been prepared by
23 Dr. Wakeham 10 years before the RJR document that
24 referenced a verbal agreement within the industry?

25 A. Approximately, yes.

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1 Q. Now were you able to locate the final draft of
2 this document?

3 A. Yes.

4 Q. Would you then go to Exhibit 10257.

5 A. I'm sorry, could you say it again?

6 Q. Yes, 10257. This is also admitted into
7 evidence.

8 This is a memorandum from Mr. Wakeham to C. H.
9 Goldsmith dated November 15, 1968. Who was Mr.
10 Goldsmith at that time?

11 A. I believe Mr. Goldsmith was the president of
12 Philip Morris U.S.A.

13 Q. The subject of this document is "Need for
14 Biological Testing and Research by Philip Morris
15 Research and Development." Correct?

16 A. Yes, which is exactly the same title as appeared
17 on the draft that we just looked at.

18 Q. All right. And where do we find in this
19 document, the final draft, the language that Mr.
20 Wakeham had used in the original draft?

21 A. Well we don't find the exact same language, but
22 the paragraph that corresponds to the paragraph that
23 we just looked at appears in the middle of page two.

24 Q. And would you read into the record, Professor
25 Jaffe, what you believe to be the final version of

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1 the language that Dr. Wakeham had initially put
2 together in which he referenced a gentlemen's
3 agreement.
4 A. The final document, he says, "We have reason to
5 believe that while this proposal to carry out
6 biological research and testing may seem a radical
7 departure from previous policy and practice, we are
8 in fact only advocating that which our competitors
9 are also doing."

10 Q. Now first of all, how did you determine that
11 Exhibit 10257 is actually the final version of the
12 draft that we saw a few minutes ago?

13 A. Well as I said, the title is the same, the first
14 sentence is essentially the same, the last sentence
15 of the paragraph before what we just read is the
16 same, and in fact Dr. Wakeham in his deposition
17 agreed that this document was the final version of
18 the draft that we just looked at.

19 Q. What is the significance, then, Professor Jaffe,
20 to the deletion of the reference to gentlemen's
21 agreement and the substitution of language consisting
22 of "a radical departure from present policy and
23 practice?"

24 A. Well I think what it shows is that Dr. Wakeham
25 was trying to convey the same idea, but decided that

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1 it was not a good idea to use the phrase "gentlemen's
2 agreement" in the final version of the memorandum.

3 Q. Do you find any substantive difference between
4 the concept that Professor Wakeham has included in
5 the final version as compared to the concept of a
6 gentlemen's agreement in the draft?

7 A. It's not as clear, it's -- it's more vague, but
8 it's not -- it's not dramatically different.

9 Q. Now in both the draft and in the final version,
10 Dr. Wakeham is including statements that competitors
11 are already doing what he's requesting authority from
12 higher management to do.

13 A. That's correct.

14 Q. And -- and that is to conduct biological
15 research on animals.

16 A. That's correct.

17 Q. Now based upon your review of the internal
18 documents of defendants, was Dr. Wakeham correct with
19 respect to his suspicions in late 1968 that Philip
20 Morris's competitors were violating the gentlemen's
21 agreement by conducting in-house animal research?

22 A. He was correct with respect to R. J. Reynolds,
23 and we'll see in a minute what the consequences of
24 that was, but he was not correct with respect to the
25 other competitors.

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1 Q. Now you mentioned earlier Professor Wakeham's

2 deposition. Did he disavow in his deposition his use
3 of the terminology "gentlemen's agreement?"

4 A. No, he did not. In his deposition he agrees
5 that there was a gentlemen's agreement, that a focus
6 of it was animal research. He actually states that
7 as being somewhat broader than that.

8 Q. Somewhat broader?

9 A. That's correct.

10 Q. Would you turn to the Wakeham deposition at page
11 89, please.

12 A. Where do I find that?

13 Q. I believe you'll find it in the very back of the
14 second volume.

15 A. Okay, I have it.

16 Q. All right. At that location in his deposition,
17 essentially what does Dr. Wakeham say about his
18 involvement in the term "gentlemen's agreement?"

19 MR. BLEAKLEY: What page are you referring
20 to?

21 MR. GILL: Page 89, beginning with the
22 question at line five.

23 A. He's asked what does he mean by the gentlemen's
24 agreement in the draft document, and he says, "Well I
25 was referring, as I recall it, to the understanding

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1 which I felt or sensed existed between the companies
2 at the time the Tobacco Research Institute was
3 established, and that is that since the companies did
4 not have expertise within their own research
5 departments, which were relatively elementary in the
6 1950s, that research being done in the general area
7 of smoking and health be done by the experts who were
8 in -- being supported through the Tobacco Research
9 Institute."

10 Q. Now let me just interrupt you for a moment.

11 When Dr. Wakeham references his understanding or
12 his sense that such an understanding existed between
13 the companies at the time the Tobacco -- of -- at the
14 time the Tobacco Research Institute was established,
15 there are two different industry organizations, are
16 there not, with similar names?

17 A. Yes. There's The Tobacco Institute and
18 there's -- there was a Tobacco Industry Research
19 Committee.

20 Q. And your understanding -- or your opinion with
21 respect to the formation of the conspiracy dates back
22 to the meetings at the Plaza Hotel; correct?

23 A. That's correct.

24 Q. And was that the time that the Tobacco Industry
25 Research Committee was formed?

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1 A. Yes, it was.

2 Q. The Tobacco Institute wasn't formed until when?

3 A. Toward the end of the 1950s. I don't remember
4 exactly when.

5 Q. Okay. Now what does Mr. Wakeham go on to state
6 starting at line 17 on page 89 of his answer?

7 A. He says, "I may have coined the term "gentleman's
8 agreement" in writing this document, but it, in my
9 mind, was a term I used to express this understanding
10 between the companies that the company laboratories
11 in general were not qualified or capable of carrying
12 out research of that kind that was necessary to
13 address the question of smoking and health, and that
14 the industry had set up The Tobacco Research Council
15 to bring together experts who would address this
16 question and who would be supported by the industry
17 for whatever researches they deemed desirable to do
18 in this field."

19 Q. Now based upon that additional reference to a
20 Tobacco Research Council bringing together experts,
21 is it clearer now which organization Dr. Wakeham was
22 referring to in the first part of his answer?

23 A. Yes. I think it's clear he means the TIRC, the
24 Tobacco Industry Research Council, that was described
25 in the Frank Statement and formed in 1954.

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1 Q. Based upon your review of Philip Morris's
2 internal documents, Professor Jaffe, did Dr. Wakeham
3 ever express sentiments that were inconsistent with
4 his answer to this question regarding the ability of
5 Philip Morris in-house scientists to conduct research
6 with respect to animals?

7 A. Yes, he did.

8 Q. He was consistent or inconsistent?

9 A. I'm sorry, in --

10 In his documents, memos written at the time in
11 the 1960s, he expressed the view that the company was
12 capable of doing this kind of research, and that in
13 fact it was important from the company's perspective
14 that this kind of research be done within the
15 company, not just through TIRC or through other
16 entities outside the company.

17 Q. So at the time of this answer, he was disavowing
18 his earlier opinion with respect to the capabilities
19 the companies had?

20 MR. BLEAKLEY: Objection, Your Honor,
21 leading. He's testifying. And it's also
22 characterizing the testimony.

23 THE COURT: All right. Rephrase it,
24 counsel.

25 MR. GILL: Certainly.

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1 Q. How would you characterize what Dr. Wakeham is
2 saying here in this answer relative to the ability of
3 the companies to conduct this research in-house with
4 what you saw him saying in documents that he
5 authored?

6 MR. BLEAKLEY: Object to that, it's been
7 asked and answered.

8 THE COURT: You may answer that.

9 A. Well he's giving an explanation here for why
10 there was this agreement not to engage in research,
11 which is not consistent with the views he expressed

12 internally through memoranda at the time about both
13 the capabilities of Philip Morris and the needs of
14 Philip Morris.

15 Q. All right. Now I believe you earlier stated,
16 Professor Jaffe, that you understood that Dr. Wakeham
17 broadened to some extent the nature of the agreement
18 that he understood or sense had taken place at the
19 time of the formation of the Tobacco Industry
20 Research Committee.

21 A. That's correct.

22 Q. Now does that occur on page 91?

23 A. Yes.

24 Q. Starting with the question at line five?

25 A. Yes. He's asked there, the question is, "What
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1 is the type of research that you understood that
2 there was an understanding that the cigarette
3 companies would not be doing in-house?"

4 And his answer is, "Studying a relationship
5 which might exist between smoking and diseases such
6 as were tabulated in the Surgeon General's report."

7 Q. Now did Dr. Wakeham ultimately learn that one of
8 the competitors that he was concerned about in the
9 memo to Mr. Goldsmith was actually violating the
10 gentlemen's agreement?

11 A. Yes, he did.

12 Q. Would you go to Exhibit 2545, please.

13 Now in this particular exhibit, Professor Jaffe,
14 you've got a memorandum from R. D. Carpenter, the
15 research and development department at Philip Morris,
16 to Dr. Wakeham, the head of the department, dated
17 October 3, 1969; correct?

18 A. That's correct.

19 Q. We're about one year out from the time of the
20 draft document and the final document that went to
21 Mr. Goldsmith; correct?

22 A. That's correct.

23 Q. And the subject of this report from Mr.
24 Carpenter was "R. J. Reynolds Biological Facilities."

25 A. That's correct.

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1 Q. All right. And he reports in the first sentence
2 of the memorandum, "Dr. Nielson showed the R. J.
3 Reynolds biological facilities to Dr. Arthur Burke of
4 American Brands and to me on Wednesday, October 1."

5 Do you have an understanding who Dr. Nielson
6 was?

7 A. Yes. Dr. Nielson was the head of the biological
8 research operation within the R. J. Reynolds research
9 facility in North Carolina at the time.

10 Q. And if you go to the -- to the next page of this
11 document -- actually go to the third page first.

12 This is appended to the memorandum, and does it show
13 the facilities that Mr. Carpenter is talking about in
14 this memo?

15 A. Yes. On the right-hand side, in sideways
16 letters, it says "R. J. REYNOLDS BIOLOGICAL

17 FACILITIES," and then included -- what we have here
18 is a floor plan indicating the layout of the various
19 rooms including where animals of unknown identity,
20 with a question mark, are going to be housed or were
21 housed, where there were rats, where there were
22 rabbits, and so forth.

23 Q. Well if RJR is party to a conspiracy not to
24 conduct in-house biological research, why is Dr.
25 Nielson giving Dr. Burke of American Tobacco and Mr.

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1 Carpenter of Philip Morris a tour?

2 MR. BLEAKLEY: Objection, Your Honor, that
3 calls for speculation.

4 THE COURT: Sustained.

5 Q. Do you have an opinion, Professor Jaffe, as to
6 an explanation for a tour of these biological
7 facilities in which Dr. Nielson hosts representatives
8 of two competitors, assuming that the companies have
9 entered into a conspiracy not to conduct the very
10 type of research that Dr. Nielson is explaining to
11 his competitors?

12 MR. BLEAKLEY: Objection, Your Honor, still
13 calls for speculation.

14 THE COURT: You may answer that.

15 A. Well I think what it shows is that there was,
16 you know, a general cooperative approach to issues of
17 research rather than a competitive one, and Dr.
18 Nielson apparently was not concerned about the
19 consequences of showing these people the facilities

Q. Well to your understanding, Professor Jaffe, was Dr. Nielson at BIR a member of upper management?

21 Dr. Nielson as not a member of upper management.
22 A. No, Dr. Nielson was not a member of upper
23 management. He was not even a director of the
24 research facility. He was just in charge of the
25 biological part of the research

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1 Q. As far as you've been able to tell from your
2 review of the internal documents, was Dr. Burke at
3 American Tobacco a member of upper management of that
4 company?

5 A No he was not

6 Q. How about MrCarpenter --

7 A. No, he was not.

8 O. -- at Philip Morris?

9 A. Mr. Carpenter was not either.

10 Q. Based upon your experience and training in the
11 fields of antitrust economics, including antitrust
12 conspiracies, is it typical for a conspiracy to be
13 communicated at various levels throughout the
14 participating companies, extending down to the middle
15 management, lower management?

16 A. Well a conspiracy would only be --

17 MR. BLEAKLEY: Object, Your Honor, leading.

18 THE WITNESS: I'm sorry.

19 MR. BLEAKLEY: I understand some leading,
20 but this is a very leading question. Mr. Gill is
21 testifying.

22 THE COURT: It is leading, counsel.
23 MR. GILL: I'll be glad to rephrase, Your
24 Honor.
25 Q. Based upon your experience, Professor Jaffe,
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1 typically what types of individuals become privy to
2 the existence of a collusive agreement between
3 companies not to compete?

4 A. Well typically the knowledge of the conspiracy
5 would be limited to those people who the upper
6 management felt needed to know about it.

7 Q. Why is that?

8 A. Well because you don't want to have knowledge of
9 illegal behavior very widespread through the company.

10 Q. If you'd go back to page two, then, of Exhibit
11 20545, there's a statement at the top of that page,
12 "Reynolds has developed an inhalation smoking machine
13 which we also saw. The machine has obviously been in
14 use for some time and is being used to expose rats to
15 cigarette smoke."

16 What does this observation by Mr. Carpenter say
17 about the status of this project?

18 A. Well what it says is that as of October of '69,
19 experiments were clearly underway with this
20 inhalation smoking machine in which animals were
21 being exposed to cigarette smoke, so this would
22 clearly be in-house animal research relating to
23 smoking and health.

24 Q. And then down at the bottom of page two it
25 reads, "In summary, R. J. Reynolds has animal

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1 experimentation facilities, a staff of 10 to 12
2 people doing animal experimentation work, and is
3 doing smoke inhalation studies."

4 Now is there any indication that Dr. Wakeham
5 initiated any type of action to bring this matter to
6 the attention of his superiors?

7 A. Yes.

8 Q. And in fact, going back to page one of this
9 memorandum, there are some initials in the upper
10 right-hand corner. Are you able to make out those
11 initials?

11 initials.
12 A. I don't know what the first one is, but the
13 second one -- the first initial seems to be C, and
14 the -- I guess -- no.

15 0 CHG?

16 A I'm sorry?

17 0 CHG?

18 A. Well that's what I thought it might be, but I
19 wasn't sure.

19 wash & said.
20 Q. Would CHG be the initials of Clifford H.
21 Goldsmith?

22 A. That's correct.

23 Q. And would RAM be the initials of Ross Millhiser,
24 who was the -- who was a senior executive and vice
25 chairman of Philip Morris at that time?

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1 A. Yes, that's correct.
2 Q. And there's a date on there next to the
3 initials?
4 A. Yes, sometime in October of 1969.
5 Q. Now did Mr. --
6 Did Dr. Wakeham receive additional reports of
7 RJR's animal inhalation activities?
8 A. Yes, he did.
9 Q. Would you turn to Exhibit 10465.
10 A. I have that.
11 Q. This is a memorandum dated December 15, 1969 and
12 was produced by Philip Morris. It is from L.
13 Weissbecker to Mr. R. D. Carpenter, who was the
14 author of the previous exhibit; correct?
15 A. That's correct.
16 Q. And in the upper right-hand corner, do you see
17 some initials?
18 A. Yes, HW.
19 Q. Okay. And in the lower left-hand corner does it
20 indicate to whom copies of this memorandum were sent?
21 A. Yes. To Dr. Osdene, and this copy apparently
22 went to Dr. Wakeham.
23 Q. And there's a check next to Dr. Wakeham's
24 typewritten name?
25 A. That's correct.

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1 Q. And the subject is "R. J. Reynolds Biological
2 Research Program;" correct?
3 A. Correct.
4 Q. And it reads in the first paragraph, "I met Dr.
5 Price from R. J. Reynolds at the CTR-USA meeting of
6 December 11 and 12, 1969. He mentioned doing chronic
7 cigarette smoke exposure studies with rats. The
8 animals received up to 500 cigarettes and emphysema
9 was produced. They were also looking for other
10 changes by apparently were not successful."
11 A. That's right.
12 Q. Now in the earlier exhibit dating back to
13 October of nineteen sixty -- or November of 1968, had
14 Dr. Wakeham sought permission from Mr. Goldsmith to
15 do in-house biological testing?
16 A. Yes, he had.
17 Q. Did he ultimately receive some response from
18 management in connection with that request?
19 A. Yes, I think he did.
20 Q. Would you turn to Exhibit 2548.
21 A. I have that.
22 Q. All right. This is a document produced from the
23 files of Philip Morris Incorporated, it is a
24 memorandum dated February 24, 1970, it is to Helmut
25 Wakeham and from Joseph Cullman III. Who was Joseph

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1 Cullman III?
2 A. Joseph Cullman III was the chairman at that time

3 of Philip Morris Incorporated.
4 Q. And in the upper right-hand corner we see again
5 Mr. Wakeham's initials and a reference to
6 confidential?
7 A. That's correct.
8 Q. Now what does this memo deal with?
9 A. It deals with Mr. Cullman's reaction or
10 follow-up to a meeting that he had with Dr. Wakeham
11 just shortly before it.
12 Q. Now the last documents that we looked at were
13 dated in late 1969; is that correct, with respect to
14 Carpenter to Wakeham and Weissbecker to Carpenter,
15 also a copy to Wakeham?
16 A. That's right. They were in the fall of 1969.
17 Q. So Dr. Wakeham had two independent reports of
18 animal biological research being conducted by RJR as
19 of the end of 1969.
20 A. That's correct.
21 Q. And we know that he copied at least one of the
22 memos to his superiors, Mr. Goldsmith and Mr.
23 Millhiser.
24 A. That's correct.
25 Q. All right. Now in the first paragraph of

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1 Exhibit 2548, Mr. Cullman states, "I enjoyed our
2 conversation last Thursday in Richmond, and I hope
3 that you feel it will serve to clear the air somewhat
4 on the strong stand I have taken in connection with
5 certain kinds of research activities by Philip
6 Morris."

7 Now first of all, is it your understanding that
8 Mr. Cullman officed in New York?

9 A. Yes.

10 Q. And Dr. Wakeham officed where?

11 A. In Richmond, where their research facility was.

12 Q. So apparently a meeting did take place on the
13 Thursday preceding February 24, 1970, a meeting
14 between Mr. Cullman, the CEO of the company, and Dr.
15 Wakeham, the head of research and development.

16 A. Yes.

17 MR. BLEAKLEY: Objection, Your Honor.

18 Objection, Your Honor, that's leading. And also the
19 document does not say meeting, it says conversation.

20 THE COURT: The objection is sustained.

21 Q. Now in the second paragraph, Professor Jaffe,
22 the author, Mr. Cullman, goes on to state, "You have
23 given me a better understanding of the rationale
24 behind your position and I repeat my assurance to you
25 that my position is not intransigent and that I am

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1 willing to discuss broad corporate policy in this
2 area with you, Ross and Cliff at regular intervals."

3 Now what's your understanding of the reference
4 to "broad corporate policy?"

5 MR. BLEAKLEY: Objection, Your Honor, that
6 calls for speculation on the part of the witness.

7 THE COURT: No, you may answer that.

8 A. Well I think in the context -- (coughing) excuse
9 me -- of the other documents we've seen and the rest
10 of this document, I think what he's talking about is
11 the -- is the broad policy of Philip Morris with
12 respect to the kinds of research they're going to do
13 or not do, including biological research.

14 Q. He then goes on, "In the meantime, I feel that
15 our present policy is the correct one and that the
16 program you are carrying out in Boston is as far as
17 we should go."

18 Do you have any understanding of what is being
19 referenced there?

20 A. Yes. I think, again, in the context of the
21 other documents, what he's saying is that he's not
22 convinced by Dr. Wakeham's arguments that they should
23 begin doing this kind of research in-house; that is,
24 within the Philip Morris laboratories, and that
25 they're going to stick with some kind of research

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1 that they're purchasing through an outside party
2 located in Boston.

3 Q. From the standpoint of the process of creative
4 destruction, is the proposal by Dr. Wakeham to engage
5 in in-house biological research consistent with that
6 process, or antagonistic to it?

7 A. Well in order to effectively engage in the kind
8 of long-term competition that we've been talking
9 about, the companies would have needed to do
10 biological research, and there are good reasons, some
11 of them articulated in Dr. Wakeham's own documents,
12 as to why it is likely to be more effective as a
13 matter of long-term competitive advantage to do that
14 research in-house rather than relying on arm's-length
15 or contract research with other parties. And so I
16 would characterize Dr. Wakeham as basically saying we
17 have to do this in order to compete effectively, but
18 he's not convincing his superiors.

19 Q. The memorandum goes on, "The possibility of
20 getting answers to certain problems on a contractual
21 basis in Europa appeals to me and I feel presents an
22 opportunity that is relatively lacking in risk and
23 unattractive repercussions in this country."

24 Is that language consistent or inconsistent with
25 your opinions with respect to the existence of an

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1 antitrust conspiracy to suppress fundamental
2 competition?

3 A. Well I think what it shows is that Mr. Cullman
4 recognizes in some ways the need for the company to
5 do this kind of research, but rather than doing it in
6 a way that would violate the agreement not to engage
7 in in-house animal research, he's trying to figure
8 out a way around that, and what he suggests is that
9 they do it outhouse, so to speak; that is, on a
10 contractual basis in Europe, and we know that in fact
11 they did eventually do that.

12 Q. All right, Dr. -- Professor Jaffe, given Dr.

13 Wakeham's desire to perform in-house animal research
14 at Philip Morris and given our review of the
15 documents reporting the incident at RJR, is it
16 reasonable to infer from this document that Dr.
17 Wakeham made Mr. Cullman aware of Dr. Wakeham's
18 understanding of what RJR was doing with respect to
19 biological testing?

20 MR. BLEAKLEY: Objection, that calls for
21 speculation.

22 THE COURT: Well you may answer.

23 A. Well it says right in the document that the
24 conversation they had in Richmond gave Mr. Cullman
25 better understanding of the rationale behind Dr.

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1 Wakeham's position. And the rationale we know
2 included Dr. Wakeham's knowledge regarding what was
3 going on at R. J. Reynolds.

4 Q. And who received copies of this memorandum, as
5 shown in the lower left-hand corner?

6 A. Mr. Weissman, Mr. Smith, Mr. Millhiser and Mr.
7 Goldsmith.

8 Q. Do you know who Mr. Smith was?

9 A. No, I don't recall.

10 Q. All right. I'd like you to assume that he was
11 the general counsel of Philip Morris at that time.

12 A. Okay.

13 Q. And the timing of this conversation would have
14 been late February 1970; correct?

15 A. That's correct.

16 Q. All right. Do the documents show what became of
17 the RJR animal testing program?

18 A. Yes, they do.

19 Q. Would you turn to Exhibit 12756.

20 A. I have that.

21 Q. And Exhibit 12756 bears the title "INTRODUCTORY
22 REMARKS: BY DR. SENKUS."

23 A. That's correct.

24 Q. This relates to what became of the RJR program
25 with respect to biological testing in-house?

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1 A. Yes, it does.

2 Q. Now I want you to assume that defendants have
3 indicated in answers to interrogatories that the
4 timing of Exhibit 12756, in connection with the
5 presentation at RJR, was March 19th, 1970.

6 A. Okay.

7 Q. So this would be approximately one month after
8 the time that Dr. Wakeham had his conversation with
9 Mr. Cullman; is that correct?

10 A. That's correct.

11 Q. All right. Do you recall what's being discussed
12 here?

13 A. Yes. Dr. Senkus is basically telling his
14 employees that the biological research facility is
15 being shut down.

16 Q. All right. And if you would go to Bates stamp
17 747, --

18 A. Yes, I have that.
19 Q. -- at item nine he indicates that altogether 26
20 staff people are being terminated; is that correct?
21 A. That's correct.
22 Q. And if you go to 749, down at the bottom of that
23 page, --
24 A. Yes.
25 Q. -- there's an indication that, "This was a tough

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1 decision to make, but there simply was no alternative
2 and for this reason we hope that the detail provided
3 will help you to understand the reasons this move is
4 necessary. We wish you 'all the best' and hope that
5 the special liberal termination arrangements we are
6 making, together with your and our best efforts, will
7 minimize hurtful effects to you and to your
8 employees."

9 Is that an indication to you that apparently the
10 shutdown of this biological facility was a matter of
11 some significance to these employees?

12 A. Yes, I think that's right.

13 Q. Is there an indication further on in this page
14 with respect to the timing of the decision to close
15 this facility?

16 A. Well in the -- I guess skip one paragraph. The
17 next paragraph, Dr. Senkus says, "I know this comes
18 to you all rather suddenly. It had to be that way to
19 give you the word first."

20 Q. How would you describe the tone of this
21 presentation by Dr. Senkus and his superior, Mr.
22 Vassallo?

23 A. Well essentially they're telling the employees
24 we're sorry this is a surprise, it came so quickly,
25 but it had to be done, and we'll do the best to help

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1 you out.

2 Q. Would the closing of that biological facility
3 have served the competitive interests of RJR?

4 A. I don't think so, no.

5 Q. Do the internal documents reflect whether Dr.
6 Wakeham learned of the closure of RJR's biological
7 testing facilities?

8 A. Yes, they do.

9 MR. GILL: Your Honor, this might be a good
10 time to break for the day.

11 THE COURT: All right. We'll recess,
12 reconvene tomorrow morning at 9:30.

13 THE CLERK: Court stands in recess, to
14 reconvene tomorrow morning at 9:30.

(Recess taken.)

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